United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

VOLUME 17 — DEPOSITIONS — Pages D1 to D330

UNITED STATES COURT OF APPEALS
FILED
DEC 19 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

CRAVATH, SWAINE & MOORE
Attorneys for Plaintiff-Appellant
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
(212) 644-8000

BERNARD KORMAN, Esq.
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Defendants-Appellees
ASCAP, et al.

HUGHES HUBBARD & REED
Attorneys for Defendants-Appellees
Broadcast Music, Inc., et al.
One Wall Street
New York, New York 10005
(212) WH 3-6500

STROOCK & STROOCK & LAVAN
Attorneys for Defendant-Appellee
Warner Bros. Inc.
61 Broadway
New York, New York 10004
(212) 425-5200

SIMPSON THACHER & BARTLETT
Attorneys for Defendants-Appellees
MCA, Inc., and Duchess Music Corp.
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

LINDEN & DEUTSCH
Attorneys for Defendants-Appellees
G. Schirmer, Inc., and
Associated Music Publishers, Inc.
110 East 59th Street
New York, New York 10022
(212) 758-1100

HOFHEIMER, GARTLIR,
GOTTLIEB & GROSS
Attorneys for Defendants-Appellees
Essex Music, Inc., and
Hollis Music, Inc.
100 Park Avenue
New York, New York 10017
(212) 725-0400

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

COURT PAPERS

VOLUME 1

	PAGE
Docket Entries	JA1
Complaint	JA19
Exhibit A	JA31
Exhibit B	JA33
Exhibit C	JA35
ASCAP Answer and Counterclaim	JA37
Excerpts from BMI's Answer and Counterclaim	JA64
Reply to ASCAP's Counterclaim	JA79
Reply Memorandum in Support of BMI's Motion for Preliminary Injunction, dated July 9, 1970	JA94
Appendix	JA115
Transcript of Proceedings of July 10, 1970	JA132
Affidavit of Amalya L. Kearse, sworn to April 26, 1971	JA170
Excerpts from Appendix to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, dated August 16, 1971	JA177
ASCAP's Reply Memorandum in Support of its Motion for Summary Judgment, dated September 3, 1971	JA185
Transcript of Proceedings of September 14, 1971	JA197

VOLUME 2

PAGE

Excerpts from Plaintiff's Memorandum in Support of Its Rule 37 Motion to Compel Answers to Interrogatories, and Production of Documents, dated August 25, 1972 ..... JA305

ASCAP Memorandum in Opposition to CBS' Motion to Compel Answers to Interrogatories and Production of Documents, dated September 27, 1972 ..... JA314

Excerpts from CBS' Memorandum in Opposition to ASCAP's Motion for a Protective Order dated September 29, 1972 JA338

Excerpts from ASCAP's Trial Brief dated April 25, 1973 ..... JA342

Excerpts from BMI Trial Memorandum dated April 25, 1973 JA353

Excerpts from Plaintiff's Post-trial Brief dated April 8, 1974 JA358

Excerpts from ASCAP's Post-trial Brief dated June 3, 1974 JA361

BMI's Post-trial Brief dated June 3, 1974 ..... JA370

Opinion and Order of Lasker, J. dated September 22, 1975 ..... JA584

TRIAL TRANSCRIPT*

VOLUME 3

	PAGES
Donald Sipes:	
Direct	14–149
Cross	150–328

VOLUME 4

Donald Sipes (concluded)	
Cross (concluded)	329–379
Redirect	380–381
Recross	382–397
Robert B. Wright:	
Direct	397–475
Cross	476–553
Redirect	553 [illegible]
Recross	561–562

* Corrections to the trial transcript appear at the close of each day's transcript:

pages of transcript	*corrections at pages*	*pages of transcript*	*corrections at pages*	*pages of transcript*	*corrections at pages*
1 to 127	127-1 to 127-8	1799 to 1954	1954-1 to 1954-4	3576 to 3748	3748-1 to 3748-12
128 to 328	328-1 to 328-8	1955 to 2108	2108-1 to 2108-7	3749 to 3919	3919-1 to 3919-13
329 to 563	563-1 to 563-6	2109 to 2458	2458-1 to 2458-10	3920 to 4081	4081-1 to 4081-9
564 to 753	753-1 to 753-5	2459 to 2623	2623-1 to 2623-6	4082 to 4241	4241-1 to 4241-10
754 to 908	908-1 to 908-4	2624 to 2801	2801-1 to 2801-5	4242 to 4426	4426-1 to 4426-10
909 to 1089	1089-1 to 1809-4	2302 to 2995	2995-1 to 2995-16	4427 to 4613	4613-1 to 4613-11
1090 to 1273	1273-1 to 1273-4	2996 to 3176	3176-1 to 3176-8	4614 to 4731	4731-1 to 4731-5
1274 to 1445	1445-1 to 1445-6	3177 to 3378	3378-1 to 3378-14	4732 to 4873	4873-1 to 4873-14
1447 to 1632	1632-1 to 1632-5	3379 to 3524	3524-1 to 3524-5		
1633 to 1798	1798-1 to 1798-8	3525 to 3575	3575-1 to 3575-2		

PAGES

Edward Duke Vincent:
Direct 571–647
Cross 647–671

VOLUME 5

Edward Duke Vincent (concluded):
Cross (concluded) 672–726
Redirect 726–730

George A. Sunga:
Direct 731–759
Cross 759–770

Albert Berman:
Direct 771–851a
910–965
Cross 965–977
Redirect 978–987

Marion B. Mingle:
Direct 852–885
Cross 885–888
Redirect 888–889
Recross 889–890

Burton Lane:
Direct 988–999

VOLUME 6

Burton Lane (concluded):
Direct (concluded) 1000–1160
Cross 1161–1172
Redirect 1172–1176

Allen H. Arrow:
Direct 1255–1360

VOLUME 7

	PAGES
Allen H. Arrow (continued):	
Direct (concluded)	1361–1536
Eugene Goodman:	
Direct	1537–1592
Cross	1593–1600
Leon Kellman:	
Direct	1604–1631

VOLUME 8

Franklin M. Fisher:	
Direct	1636–1767
Cross	1768–1785
Walter L. Dean:	
Direct	1799–1823
Cross	1824–1861
Redirect	1862–1865
Allen H. Arrow (concluded):	
Cross	1962–1996
Redirect	1997–2003
Recross	2003–2005
Further Redirect	2006
Irwin Segelstein:	
Direct	2009–2032
Cross	2032–2042

VOLUME 9

Emil Poklitar:	
Direct	2044–2074
Cross	2074–2100
Redirect	2101–2102
Paul Marks:	
Direct	2400–2571
Cross	2571–2623

VOLUME 10

	PAGES
Paul Marks (concluded):	
Cross (concluded)	2624–2728
Salvatore Chiantia:	
Direct	2854–2910
Cross	2910–2932

Volume 11

Salvatore Chiantia (concluded):	
Cross (concluded)	2933–3058
Redirect	3058–3062
Recross	3062–3064
Alan Shulman:	
Direct	3065–3096
Cross	3097–3136
Redirect	3137–3138

VOLUME 12

Michael Dann:	
Direct	3213–3299
Cross	3299–3378
	3411–3439
John Green:	
Direct	3440–3460
Cross	3460–3476
Aaron Copland:	
Direct	3478–3487

PAGES

Arnold Broido:
Direct 3488–3497
Cross 3497–3501

VOLUME 13

Herman Finkelstein:
Direct 3577–3660
Cross 3660–3829
Redirect 3829–3837

Robert R. Nathan:
Direct 3842–3919

VOLUME 14

Robert R. Nathan (continued):
Direct (continued) 3920–3968
Cross 3969–4206

Paul Marks:
Direct 4207–4221
Cross 4221–4241

VOLUME 15

Edward Cramer:
Direct 4244–4289
Cross 4290–4358

Paul Rosenthal:
Direct 4358–4375
Cross 4376
Redirect 4376
Recross 4377–4378

Peter Q. Steiner:
Direct 4378–4420
Cross 4420–4473
Redirect 4473–4475
Recross 4475–4480

Robert R. Nathan (concluded):
Direct (concluded) 4526–4556
Cross (concluded) 4557–4613

VOLUME 16

	PAGES
Fred Silverman:	
Direct	4733–4759
Cross	4759–4766
Redirect	4766
Franklin M. Fisher:	
Direct	4767–4852
Cross	4853–4863
Redirect	4863–4864

DEPOSITIONS

VOLUME 17

	PAGE
Excerpts from the Deposition of Stanley Adams	D1
Excerpts from the Deposition of Allen H. Arrow	D66
Excerpts from the Deposition of Al Brackman	D70
Excerpts from the Deposition of Leon Brettler	D111
Excerpts from the Deposition of Salvatore Chiantia	D263

VOLUME 18

Excerpts from the Deposition of Cy Coleman	D331
Excerpts from the Deposition of Paul Fagan	D347
Excerpts from the Deposition of Herman Finkelstein	D546
Excerpts from the Deposition of Sidney Herman	D624

VOLUME 19

	PAGE
Excerpts from the Deposition of Edwin H. Morris	D641
Excerpts from the Deposition of William S. Paley	D761
Excerpts from the Deposition of Emil D. Poklitar	D766
Excerpts from the Deposition of Frank Stanton	D852
Excerpts from the Deposition of Jerry Vogel	D911
Excerpts from the Deposition of Ned Washington	D938
Excerpts from the Deposition of Philip B. Wattenberg	D991
Excerpts from the Deposition of Robert D. Wood	D1013

EXHIBITS

VOLUME 20

Court Exhibit ("CX") No. 2—Stipulation between CBS and ASCAP, dated 5/25/72, in this action	E1
CX 2, Exhibit No. 1—Standard form of CTN "Television Affiliation Agreement", dated 2/66	E11
CX 2, Exhibit No. 2—Standard form of ASCAP writer and publisher membership agreement, Form 10M-1-72U, covering the years 1966-1975	E19
CX 2, Exhibit No. 3—Standard forms of ASCAP "Application for Writer-Membership", Form 4M 11-71, with attached form of cover letter, and "Application for Publisher Membership", Form 2M 6-71, with attached form of cover letter	E24
CX 2, Exhibit No. 4—Standard form of ASCAP writer and publisher membership agreement, Form 2500 7-65, covering the years 1941-1965	E36
CX 2, Exhibit No. 5—Form of ASCAP "Television Performing Rights Agreement", supplementing the membership agreement (CX 2, Ex. 4) to include television performing rights	E41

PAGE

CX 2, Exhibit No. 6—List of "ASCAP Affiliated [Foreign] Repertories", dated 1972 ..... E44

CX 2, Exhibit No. 7—Form of ASCAP Performing Rights Agreement used in connection with the foreign performing rights licensing societies listed in CX 2, Ex. 6 above, wherein ASCAP grants rights to licensee E46

CX 2, Exhibit No. 8—Form of ASCAP Performing Rights Agreement used in connection with the foreign performing rights licensing societies listed in CX 2, Ex. 6 above, wherein licensor grants rights to ASCAP E56

CX 2, Exhibit No. 9—"Articles of Association of the American Society of Composers, Authors and Publishers", dated 1/70 E68

CX 2, Exhibit No. 10—Amended Consent Judgment, dated 3/14/50, *U.S.* v. *ASCAP* (Civil Action No. 13-95) E124

CX 2, Exhibit No. 11—Order, dated 1/70/60, and attachments as amended to date in *U.S.* v. *ASCAP* (Civil Action No. 13-95) E139

CX 2, Exhibit No. 12—Pamphlet, whose cover is a letter, dated 6/28/63, from Stanley Adams "To All Members of the Society", describing the pamphlet's contents as "The ASCAP Survey" by Dr. Joel Dean, which Judge McGeehan suggested be distributed to all ASCAP members E209

CX 2, Exhibit No. 13—ASCAP Financial Statements for the calendar years 1960-1969, with attached cover letters from Stanley Adams to "Dear Member", dated 4/11/61, 4/19/62, 4/1/63, 4/18/64, 4/15/65, 4/20/66, 4/24/67, 4/4/68, 4/2/69, 4/9/70, respectively E254

CX 2, Exhibit No. 14—Standard forms of ASCAP license agreements, currently in effect:

Title	*Form No.*
Local Station Blanket Radio License	5M-11-69-U
Local Station Per Program Radio License	7500-9-67
Local Station Blanket Television License Agreement	—
Local Station Per Program Television License Agreement	— E285

CX 2, Exhibit No. 15—Standard forms of ASCAP license agreements, preceding the current forms (CX 2, Ex. 14):

Title	*Form No.*	PAGE
Local Station Blanket Radio License	3M-3-67	
Local Station Program Sustaining License	160	
Local Station Blanket Television License	1M-12-67	
Local Station Per Program Television License	1000 Jan. 1967(u)	E354

VOLUME 21

CX 2, Exhibit No. 16—Certificate of Incorporation of Broadcast Music, Inc., dated 10/13/39 ..... E371

Court Exhibit No. 3—Stipulation between CBS and BMI in *CBS* v. *ASCAP*, dated 10/15/71 ("So Ordered 10/26/71") E386

Plaintiff's Exhibit No. 12—Finkelstein Affidavit, dated 6/25/70 in *U.S.* v. *ASCAP (NBC Application)* E390

Plaintiff's Exhibit No. 14—Finkelstein Affidavit, dated 7/10/70 in *U.S.* v. *ASCAP (NBC Application)* E405

Plaintiff's Exhibit No. 24—Excerpts from ASCAP Brief on Appeal, dated 3/30/71, *United States* v. *ASCAP* (*Matter of Zekley*) E415

Plaintiff's Exhibit No. 53—AGAC Uniform Popular Songwriters Contract, bearing copyright dates: 1948 (SPA) and 1969 (AGAC) E430

Plaintiff's Exhibit No. 84—Letter dated 10/29/59 from Salvatore Chiantia to Miriam Stern E439

Plaintiff's Exhibit No. 102—Post-1970 pamphlet, "ASCAP—The Facts" E441

Plaintiff's Exhibit No. 106—Stanley Adams' "Remarks—AGAC Meeting, Hotel Edison, October 28" E448

Plaintiff's Exhibit No. 123—Letter dated 11/4/65 from Harold Spina to Miriam Stern E458

Plaintiff's Exhibit No. 124—Letter dated 11/19/65 from Michael H. Goldstein to Burton Lane E461

Plaintiff's Exhibit No. 125—Memorandum dated 1/24/66 from Abel Baer to Donald Kahn enclosing AGAC Counsel "Report to the West Coast Committee" dated 1/12/66 ..... E465

Plaintiff's Exhibit No. 127—Memorandum dated 4/22/66 from Leon Kellman to Burton Lane E470

PAGE

Plaintiff's Exhibit No. 133—Excerpt from "Report to New York AGAC Counsel from the West Coast Committee" dated 5/11/67 ..... E475

Plaintiff's Exhibit No. 134—Letter dated 5/18/67 from Burton Lane to Vic Mizzy E477

Plaintiff's Exhibit No. 135—Memorandum dated 7/25/67 from Burton Lane to AGAC West Coast Committee E480

Plaintiff's Exhibit No. 137—Excerpt of Report of the AGAC West Coast Committee Meeting dated 5/10/66 ..... E484

Plaintiff's Exhibit No. 162—Memorandum dated 10/19/59 from Miriam Stern to Alan Shulman enclosing Lane-Bernstein letters 10/2/59, 10/6/59, 10/14/59 and 10/15/69 ..... E486

Plaintiff's Exhibit No. 405—Blanket Network Television License Agreement between NBC and ASCAP, dated 1/10/58 as of 1/1/58, covering the period 1/1/58 through 12/31/61 (furnished by ASCAP as Exhibit M in connection with ASCAP Answer, dated 6/30/70 to CBS Interrogatory 28) E491

Plaintiff's Exhibit No. 430—ASCAP Supplementary Answer, dated 3/15/73, to CBS Interrogatory No. 26 ..... E533

Plaintiff's Exhibit No. 442—Form of BMI publisher affiliation agreement used from January 1959 to March 1969 (furnished by BMI as Exhibit 1 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9) E537

Plaintiff's Exhibit No. 443—Two forms of BMI publisher affiliation agreement used from March 1969 to August 1970 (furnished by BMI as Exhibit 2 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9) E543

Plaintiff's Exhibit No. 449—Two forms of BMI writer affiliation agreement used from December 1968 to July 1970 (furnished by BMI as Exhibit 8 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory 9) E552

PAGE

Plaintiff's Exhibit No. 458—BMI Answer, dated 3/23/73, to CBS Interrogatory No. 26 ..... E561

Plaintiff's Exhibit No. 469—BMI Writer Payment Schedule in effect as of January 1, 1972 (Dated September 1972) E563

Plaintiff's Exhibit No. 470—BMI Publisher Payment Schedule in effect as of January 1, 1972 (Dated September 1972) E570

Plaintiff's Exhibit No. 471A—BMI-Publisher Affiliation Agreement with a publisher where no previous agreement between the parties existed E577

Plaintiff's Exhibit No. 471B—BMI-Publisher Affiliation Agreement with a publisher canceling and superseding any prior agreement between the parties E582

Plaintiff's Exhibit No. 472—Current form of BMI-Writer Affiliation Agreement E587

Plaintiff's Exhibit No. 513—Affidavit of Edward M. Cramer, in this action, dated 10/21/70 ..... E592

Plaintiff's Exhibit No. 517—Memorandum of defendants ASCAP, et al. (by Paul Weiss), dated 11/10/71, in this action E598

Plaintiff's Exhibit No. 567—Excerpts from Statement of Herman Finkelstein, General Attorney for ASCAP on Hearing Before Special Subcommittee of the Judiciary Committee of the House of Representatives in Connection with Its Study of the Anti-Trust Laws, September 18, 1956 ..... E606

Plaintiff's Exhibit No. 568—Excerpts from Deposition of H. Finkelstein in *Cascade Broadcasting Co.* v. *ASCAP* E611

Plaintiff's Exhibit No. 572—Excerpts from deposition of Edward Cramer in *BMI* v. *NBC* E627

Plaintiff's Exhibit No. 575—ASCAP's Reply Memorandum (by Sullivan & Cromwell) dated 5/1/70, *United States* v. *ASCAP (Application of NBC)* E633

PAGE

Plaintiff's Exhibit No. 579—BMI pamphlet, "You—and the Music You Use", dated 7/69 ..... E646

Plaintiff's Exhibit No. 689—Letter dated 10/29/64 from Allen Arrow to George Lee E652

Plaintiff's Exhibit No. 722—AGAC Bulletin dated May 1966, Volume 3, No. 2 ..... E655

Plaintiff's Exhibit No. 839—Music Study, Summaries of Transactions, Songs and Plays of All Performances for 17 ASCAP Publisher Groups E660

Plaintiff's Exhibit No. 840—Music Study, Summaries of Transactions, Songs and Plays of Feature and Qualifying Performances for 17 ASCAP Publisher Groups E671

Plaintiff's Exhibit No. 866—Draft, dated 11/1/65 of 3MPX 27 .... E682

Plaintiff's Exhibit No. 899—Respondent's Conditional Offer of Proof, 4/17/62, *U.S.* v. *ASCAP (Shenandoah)* E692

VOLUME 22

Plaintiff's Exhibit No. 900—Transcript of 34th Annual Meeting of AGAC, November 1965 ..... E731

Plaintiff's Exhibit No. 908—Affidavit of Michael Dann, sworn to July 7, 1970, in this action E808

Plaintiff's Exhibit No. 962—H. Finkelstein Affidavit 12/21/61, in *U.S.* v. *ASCAP (Shenandoah)* E815

Plaintiff's Exhibit No. 986—Letter dated November 12, 1971, from Alan J. Hruska to Jay H. Topkis E825

Plaintiff's Exhibit No. 987—Letter dated November 18, 1971, from Jay H. Topkis to Alan J. Hruska E829

Plaintiff's Exhibit No. 992—Letter from Allan Blumstein to Alan J. Hruska dated February 12, 1974 ..... E831

3MPX No. 2—Memorandum dated 7/6/64, "ASCAP Performance Fee Proposal; 3M-700 Outright Sale Unit" E833

PAGE

3MPX No. 4—Letter dated 8/18/64 from J.M. Collins to Allen Arrow E838

3MPX No. 7—Letter dated 8/27/64 from J. M. Collins to Allen Arrow E840

3MPX No. 11—Memorandum "Tentative Proposal to ASCAP from 3M for Use in Connection with the 3M-700 Series" E842

3MPX No. 18—Letter dated 6/28/68 from Allen Arrow to M.E. Ricketts E845

3MPX No. 19—Letter dated 7/4/68 from Mr. M.E. Ricketts to Allen Arrow E847

3MPX No. 27—Letter dated 11/15/65 from Burton Lane to "Dear Publisher" E849

3MPX No. 42—Memorandum dated 12/28/74 from Allen Arrow to Milton Kramer E853

3MPX No. 43—Memorandum dated 1/12/65 from Milton Kramer to Allen Arrow E858

3MPX No. 47—Letter dated 7/15/65 from Alan L. Shulman to Allen Arrow E860

3MPX No. 49—Letter dated 10/11/65 from Allen Arrow to R.E. Lindgren E862

3MPX No. 72—Letter dated 11/17/65 from Lee V. Eastman to Allen Arrow E864

3MPX No. 75—Letter dated 4/22/66 from Allen Arrow to R.E. Lindgren E866

3MPX No. 144—Letter dated 11/5/64 from R.E. Lindgren to Arthur Israel E871

3MPX No. 145—Letter from E. C. Timberlake to A. Arrow, dated 12/1/64 ..... E874

3MPX No. 168—Memorandum dated 11/19/65 from Alan Shulman to Harold Richmond E879

PAGE

3MPX No. 171—Letter dated 12/4/64 from Allen Arrow to Phillip B. Wattenberg enclosing copy of a letter dated 11/27/64 from R. E. Lindgren to M. E. Ricketts E881

ASCAP Exhibit No. 126—CBS-BMI Television Network Blanket License dated 1950 with letters extending to 1969 ..... E888

ASCAP Exhibit No. 127—CBS-ASCAP TV Network Blanket License Agreements dated 10/17/49, 2/19/54 ..... E907

VOLUME 23

ASCAP Exhibit No. 127 (concluded)—CBS-ASCAP TV Network Blanket License Agreements dated 1/10/58 and 12/19/69 1042

ASCAP Exhibit No. 175—ASCAP-ABC Blanket License for ABC Television Network dated 1/10/58 ..... E1138

ASCAP Exhibit No. 184—Letter dated 10/2/59 from Burton Lane to "Gentlemen" E1229

ASCAP Exhibit No. 193—Contract dated November 5, 1965, between 3M and Fred Ahlert Music Corp. E1231

ASCAP Exhibit No. 194—Contract dated November 5, 1965, between 3M and Ahlert-Burke Corp. E1244

ASCAP Exhibit No. 195—Contract dated August 23, 1965, between 3M and Barton Music Corp. E1257

ASCAP Exhibit No. 196—Contract dated January 22, 1965, between 3M and Bourne Co. E1268

ASCAP Exhibit No. 197—Contract dated October 1, 1965, between 3M and Brandom Music Corp. E1278

ASCAP Exhibit No. 198—Contract dated February 2, 1966, between 3M and Chippendale Music Co. E1289

PAGE

ASCAP Exhibit No. 216—Contract dated September 1, 1965, between 3M and Southern Music Publishing Co. E1471

ASCAP Exhibit No. 217—Contract dated January 25, 1965, between 3M and Shapiro, Bernstein & Co., Inc. E1486

ASCAP Exhibit No. 219—Contract dated October 1, 1965, between 3M and Laurel Music Corp. E1496

ASCAP Exhibit No. 222—Contract dated April 2, 1965, between 3M and Hi-Ti Music Corp. E1507

ASCAP Exhibit No. 223—Contract dated November 5, 1965, between 3M and Irilene Music, Inc. E1517

ASCAP Exhibit No. 290—Agreement dated as of 7/1/67 between CLGA and Producers E1529

ASCAP Exhibit No. 326—Gitter Affidavit dated 6/17/74 in this action E1563

BMI Exhibit No. 114—BMI Consent Decree dated December 29, 1966 ..... E1568

BMI Exhibit No. 166—Letter from Edward Cramer to CBS dated October 29, 1969 ..... E1579

EXCERPTS FROM THE DEPOSITION OF STANLEY ADAMS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

v. (M.E.L.)

69 Civ. 5740

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants.

- x

April 3, 1973
10:00 a.m.

Deposition of STANLEY ADAMS taken by Plaintiff pursuant to notice at the offices of Cravath, Swaine & Moore, Esqs., One Chase Manhattan Plaza, New York, New York 10005, before Herbert H. Prokop, a Shorthand Reporter and Notary Public of the State of New York.

APPEARANCES

CRAVATH, SWAINE & MOORE, Esqs.,
Attorneys for Plaintiff
One Chase Manhattan Plaza
New York, New York 10005
ROBERT S. RIFKIND, Esq.,
ROBERT K. BAKER, Esq.,
of Counsel.

PAUL WEISS RIFKIND WHARTON & GARRISON, Esqs.,
Attorneys for Defendant ASCAP
345 Park Avenue
New York, New York
JAY TOPKIS, Esq.,
of Counsel.

-and-

HERMAN FINKELSTEIN, Esq.,
By: BERNARD KORMAN, Esq.,
of Counsel.

HUGHES, HUBBARD & REED, Esqs.,
Attorneys for Defendant Broadcast
Music, Inc., et al.
One Wall Street
New York, New York
RICHARD WILE, Esq.,
of Counsel.

...

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that such deposition may be signed and sworn to before any officer authorized to administer an oath.

S T A N L E Y A D A M S, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY

MR. RIFKIND:

Q Mr. Adams, will you give your name and address to the reporter.

A The name I gave. 3 Orchard Lane, Great Neck, New York.

Q Mr. Adams, are you the President of Defendant ASCAP?

A Yes, I am.

Q You have been president of ASCAP, or I should say you were president of ASCAP from 1953 to 1956?

A Yes.

Q And from 1959 to the present?

A Yes.

Q You are also Chairman of the Board of ASCAP?

A Yes.

Q Does that office always go with the office of the presidency?

A It has.

* * *

field so that while the exploitation methods are identical, the specialization differed.

Q Did you organize a company called the Stanley Adams Music Company?

A Yes.

Q Is that still in existence?

A The corporation has been dissolved.

Q What was the purpose of organizing that company?

A Economics of course always plays a part in that. There were other reasons. E. B. Marks had "What a Difference a Day Makes" and "My Shawl." It was E. B. Marks when they retired from ASCAP.

At the end of 28 years there is a privilege of renewal on the part of the writer and I exercised and put that in Stanley Adams, the ASCAP part of the firm.

Q Did you have two companies? One in --

A Of course not.

Q There are writers who are principlas of publishing companies?

A I am just talking about myself. I know nothing about any writers.

Q When did you organize Stanley Adams?

A When the renewal rights came due on "What a Difference a Day Makes." I would say 1962.

Q And that had previously been published by Marks?

A Yes.

Q Do you recall when Marks left ASCAP and went to BMI?

A No. Early 1940's. Exactly, I don't know.

Q Had they published your works at that time? Had Marks, that is, by 1940?

A They published some of my works up to 1940. Not all, of course.

Q Did you ever discuss with any of the officers of Marks their decision to leave ASCAP and join BMI?

A I did not.

Q Did you discuss that decision with other writers?

A I did not.

Q Did you discuss it with anyone?

A No.

Q Wasn't it, in fact, a lively subject of

discussion at that time, within the craft?

A Yes, it was.

Q Did anyone discuss it with you?

A You see, the word discussion is semantics.

Q I mean talk about it.

A People wondered why Marks left ASCAP, if they did, what they were going to get from BMI if they did leave ASCAP, and it was all hypothetical and theoretical. Nothing of any great moment.

Q Did a number of writers, to your knowledge, leave Marks at that time?

A Not to my knowledge.

Q Did you hear that a number of writers did so?

A No.

Q Did any representative of Marks ever seek orally or in writing to explain to you their decision to leave ASCAP?

A Not that I recall.

Q Did you come across writers who expressed the view that Marks had acted improperly?

A No.

Q We were talking about your work with

to the membership in time for Christmas and because of that we hold the meeting generally around the 15th of December, in order to get the checks out in time.

Q Was the subject matter of Mr. Wood's letter discussed at the January meeting of the board?

A I don't recollect that exactly. I know we were served with papers, we were in litigation so there was very little to discuss that.

What was discussed was to defent the suit brought by CBS. CBS shortcircuited any necessity of discussing that letter.

Q What was the nature of the discussion that did occur?

A In general, and again this goes towards putting me through a memory course, that we are being sued by CBS and then we would defend the suit.

Q Was there any discussion as to why you should defend the suit?

A I guess when you are going to think somebody is going to put a match to your house you generally get a hose to put out the fire.

Q Was the CBS complaint viewed by you as putting a match to your house?

A It's possible. Any match is liable to burn

down a house.

Q At least a house of straw.

Prior to the board meeting of January 29, 1970, had you discussed the substance of Mr. Wood's letter of December 19th with any member of the ASCAP board?

A Yes.

Q With whom did you discuss it?

A I don't remember. Just in general. I may have had lunch with somebody, or a committee meeting, or something of that sort.

Q What was the substance of the discussion?

A As far as I remember, we couldn't begin to think what CBS was aiming at, what they were driving at. It was a very general letter. It certainly wasn't specific.

Q Did anyone express to you or did you express to anyone a view as to what it was that CBS was driving at?

A How could I guess what CBS was driving at? It's up to CBS to tell us.

Q I am not asking you how you could; I am asking you whether you did it.

A No.

* * *

Q Do you, today, have an opinion as to whether any form of per use licensing would be desirable or undesirable?

A I don't know what you mean by it.

Q Let's make the following supposition, Mr. Adams: Suppose that CTN, CBS Television Network proposed to pay ASCAP a specified fee for each use made by CTN of a work in the ASCAP repertory that fee to vary upon the nature of the use, that is the background, and so forth, according to a schedule of fees to be agreed upon, and in the absence of a specific agreement between the parties as to the price tag on that schedule of fees, the fees to be set by the court, let's say by Judge Ryan; do you have an opinion as to whether that arrangement, which is, as I understand it, different from the arrangement now prevailing, would be desirable?

MR. TOPKIS: Is that the end of the question?

MR. RIFKIND: May we have it read back, please?

(Question read.)

MR. TOPKIS: I would point out that it is not only different from the arrangement now prevailing but it is also different from any arrangement I have heard before suggested in the course of this litigation.

That doesn't mean that I object to the

witness's answering the question but it looks like we are off on variant 87. If you have an opinion--

A I don't have an opinion on that. I think all the terms and conditions would have to be much more clearly thought out, and I think in light of this sudden supposition that I have never heard here to information, that I would have to think about that. I would have to think about whether or not I considered that, from the standpoint of the ASCAP membership, a better form of licensing than now exists or than others that may be available.

I would not give you an off-the-cuff opinion at this meeting because I don't know.

Q What other things would you want to know as a predicate for an opinion?

A You would have to tell me what the entire thing is. I don't know. I am not going to tell you what to ask. I don't regard that as a complete form of per use license. There may be other ramifications that you haven't expressed.

Q Just talking what I have expressed as an offer.

A I would have to think about that because I would have to take all the terms and conditions that

are implied in that, not only what you have mentioned--and I'm not at this moment prepared to tell you what the other things are--I certainly could not take a supposition like that, that's flung at me at this particular moment, and give you an opinion. I don't know.

Q You say this is different from any form of previous license that you have ever heard of before. What form of previous per use licenses have you considered in the past?

MR. TOPKIS: I think he said type of license.

A I said type of license.

Q Have you given thought to any form of license that is similar to what I have just described to you but perhaps better and more fully articulated?

A Mr. Rifkind, the answer is very definitely no. You see, I may be a very old-fashioned fellow but I think that ASCAP has the perfect type of licensing and before I would give consideration to some other form of license I would have to have the germ or seed in my mind that there is something wrong with the present licensing form and now I am talking about encompassing the entire betterment of the entire membership and not STanley Adams per se. That's part of my job.

The license we offer today has served the

* * * D 12

disabilities, if I can use the term, to benefit the overall picture of their colleagues.

Q For instance?

A For instance you have a blow down award system.

Q What is a blow down?

A Well, that is where the writers in classes above 975 take less money for performances in order to benefit those below.

The Awards Committee, comprised of people who are not members of ASCAP, make certain awards and five per cent of the writers' money is taken and deposited--rather, goes to these people for the benefit of people who are in less fortunate economic positions since nobody get an award who gets more than, I believe, $15,000 a year in the popular field and $20,000 a year in the symphonic. The people who get most of the awards cannot give any of it back. There are things beyond the commercial aspects in ASCAP's distribution and philosophy that are not so simply answered as the questions you are directing to me. So, therefore, since ASCAP membership is benefitting by the existance of ASCAP, I think it would be much worse for the writers of this country if there were no ASCAP or BMI.

(Recess to 2:00 o'clock P.M.)

* * *

* * *

I am not asking you for a verbatim report.

A No, I mean the contents. I don't draw them in the first place.

Q Are they always drafted by Mr. Finkelstein?

A Yes.

Q What is the function of the advisory committee?

A The advisory committee is a committee that meets to bring to the attention of the board of directors, through me, some of the things that are going on, some of the questions that the membership might have, some of the things they think might need changing.

It is done to let the membership feel that they are part and parcel of the society's operation because ASCAP only exists for its members, that is the whole function, and the publishers have one, the writers have one but the writers have another one on the West Coast and the publishers do not. It is like a seminar, very informal. We meet twice a year. Sometimes there is an agenda and sometimes there is not. There is no formality as to what you can talk about.

It is a free-for-all, colleagues getting together discussing mutual problems.

Q These are people that are not on the board?

A Not on the board.

Q And you meet with them?

A I chair both, all the meetings.

Q Who else attends the meetings? Does Mr. Finkelstein attend the meetings?

A He does, yes.

Q Anyone else?

A Yes.

Q Is it an elected committee?

A Appointed.

Q Appointed by the president?

A By me.

Q Other than your appointees who else participates?

A Someone from management, in the East Paul Mark, Paul Adler, sometimes Dave Coombs On the West Coast, Regional Director Herb Gottlieb.

Q When was the most recent meeting of the advisory committee?

A When I was in California, probably the 20th or 29, February.

Q What are the types of things that are discussed?

A Anything you can think of.

Q What, in fact, was -

A Well, they are not very vital matters that are discussed.

Why such and such doesn't get more of a performance credit than something else, matters that are comparatively unimportant.

But it is basic, you give the feeling to the membership, they are participating in the actions of their society.

Q How many West Coast writer members are there?

A Well, listed, I don't know. I would say about 25.

Q And the East Coast a like number?

A Yes.

Q And publishers?

A Publishers,don't have too many.

Q How many?

A About seven or eight.

Q Those seven or eight are not board members?

A They are not board members.

Q Mr. Adams, let me show you a newspaper clipping from the March 17th, 1973 issue of Cash Box, headline "Jazz Composers Claim: Works in Limbo, No Logging Department."

A I have seen it.

Q Have the complaints referred to in this article been discussed at an advisory committee meeting?

A Yes.

Q What resolution was reached, if any?

MR. TOPKIS: Could you possibly indicate to me some relevance of this line of inquiry to the issues in this litigation?

MR. RIFKIND: Yes.

MR. TOPKIS: Would you?

MR. RIFKIND: Yes. The complaints referred to in the article reflect the fact that the ASCAP distribution system results in an uneconomical allocation of ASCAP revenues, and fails to reward writers in proportion to the use of their music, a circumstance which does not redound to the

* * *

Q But these problems all have public domain as a springboard.

A That's correct, if that's what you mean, then I don't think there is another function for that committee that I can recall.

Q Does the committee proceed by making recommendations for a determination in each specific instance or does it proceed by general rule?

A Each instance.

Q Do you have a public relations committee?

A Yes, very emphatically.

Q What are the principal functions of the public relations committee?

A I like to think of that as a three-headed monster, euphemistically speaking. Public relations, customer relations, and this committee functions in the public relation aspects, as distinguished from the other, and chaired by Cy Coleman.

Q You say it has three --

A That's my version. Public relation, membership relation and customers relations.

Q What sorts of activities does it engage in in respect to customers relations?

A I, for instance, will go around as a member,

of course I'm ex-officio, but I will go around to radio stations, television stations, visit them, socialize with them, try to find out if there are particular problems involved. I would go and address, if I am asked to, different radio stations, conventions, little parties. We have a station relations department that goes around to visit our customers. In general, that's about the size of the customers relations aspect. We used to have a publication. For instance if a program director wanted to talk about rivers, program about rivers, we would supply a list of all river songs, birthday songs, and make programs and, smile though you may, the correspondence and the appreciation of that was very, very heavy, particularly on the radio end of it.

Q Is it an aspect of the work with respect to customer relations to promote the use of ASCAP music?

A No.

Q Just to keep ASCAP customers happy? Is that the thrust of it?

A I wish I can say that is true.

Q Does that --

A Yes, it aims to have as fine a relationship as possible between the customer and ASCAP.

Q Does it receive complaints from customers?

A As to rates? D 19

Q I mean complaints about service --

A The public relations committee receives no complaints from customers.

Q The membership aspect of this work, what is that addressed to?

A Somebody's birthday, the Gershwin stamp we just got, anything that's going to project the membership, what it contributes, how it helps, the musical culture of this country, publicizing our membership wherever possible, individuals, the honors they received, the magazine we put out, all directed to -- and, as I told you, a large part of my job is concerned with membership relations. There are many facets to membership relations.

Q Do I understand then that membership aspect of this committee's work is designed really to keeping the existing members happy? Is that one of the things that it is supposed to be doing?

A That's one of the things it is supposed to be doing, yes.

Q And public relations, what is that addressed to? The third head of your three-headed monster.

A As I say, like the Gershwin stamp, we sent

that to a number of prominent people, and the honors that were being granted to ASCAP members. We have functions. I was engaged as chairman to keep the public library alive in this city, the music division. That's public relations. I raised $130,000; otherwise the music section of the public library would have closed. ASCAP regards itself as a good public citizen over and above the mere function of being a performing rights society. The public relations aspect is part of that.

Q Is one of the aspects of that activity membership recruiting?

A No, not public relations, except in the advertising.

Q Does the public relations committee have responsibility in the first instance at least, with respect to advertising?

A Yes, they do.

Q Do they develop an advertising program?

A We have an advertising agency that develops the program for submission to the sub-committee of the public relations committee, that supervises the ads.

Q That, in turn, reports to the board on the advertising budget?

A The budget definitely, yes.

Q And that is approved by the board?

A The budget for the public relations committee and, of course, part of the subsidiary of that budget is the advertising is submitted to the finance committee. The finance committee then submits its reports to the board of directors.

Q Do you know how large the budget for advertising is?

A No.

Q Do you know approximately how large it is?

A No.

Q Do you advertise for purposes other than the recruiting of membership?

A Yes, I told you that. We let the world know what the membars are doing, honors they have received.

Q Do you advertise for the purpose of recruiting membership?

A Yes.

Q Why is that?

A Economics.

Q What are the economics?

A Well, I'm sure you know the answer, but I'll give it to you anyway; that on the charts, the charts have become very, very important in negotiations. We

found B.M.I. assuming the ascendency to some degree in radio and, faced with negotiations for local radio, it seemed to us that the way to counterbalance and get our posture more favorable was to have more of the current members who were doing the work, making the charts, and that was the genesis of the progress committee's work in recruiting and getting members into ASCAP so that in future negotiations ASCAP would be in a better position to receive more money. Economics, yes.

Q By "charts," I take it you were referring to the hit tune top record charts?

A Several charts. There is the middle of the road or so-called easy-listening chart, the top hundred. country and western, the soul, and so on.

Q Does the advertising seek both to attract writers who are not now members of any performing rights society and to attract writers who are members of BMI or affiliates?

A B.M.I. is never thought of in connection with this.

Q You make no effort to attract writers from B.M.I.?

A We make effort to attract writers in the ASCAP

banner. We don't look for labels, B.M.I. or non-affiliated, or who they are.

Q You are not distressed, are you, or are you, when you attract a B.M.I. member to ASCAP?

A No, certainly not.

Q Let me show you an advertisement that apparently appeared in Variety on Page 43 on December 27, 1972.

A Yes.

Q It says in the right-hand column in print that a lot of people who thought they couldn't join ASCAP suddenly discovered they could, and did the first chance they got; "they also discovered that at ASCAP they had a voice in the decisions that affected them, because ASCAP is run by its own members and that makes a difference."

A difference from what?

A That makes a difference in the fact that they are having a say in the organization versus not having a say in the organization.

Q Is there an organization in which they don't have a say?

A Yes, of course.

Q Which organization?

A B.M.I.

MR. RIFKIND: Will you mark that?

(The advertisement that appeared in Variety on Page 43 on December 27, 1972 marked CBS-Adams Exhibit 110 for identification.)

Q Let me show you Plaintiff's Exhibit 108 for identification and ask you if you have seen that advertisement before.

A Yes.

Q This ad says, "Why is the move to ASCAP? Because ASCAP pays more." ASCAP pays more than who?

A More than B.M.I., more than SESAC.

Q Does ASCAP pay more than B.M.I. and SESAC?

A On a feature performance, I would say yes.

Q Let me show you Plaintiff's Exhibit 120 for identification, which is a print of an advertisement with an attached memorandum to Mr. Bryan Buda --

A I want to go back to that statement. Provided it's running on the same track. I just want to add that.

Q What does "the same track" mean?

A If it's a popular song, feature performance, we pay more.

Q This ad says in very large, boldface type, "You own us. They own you." Have you seen that ad

before?

A Yes, I have.

Q The memorandum that is attached to it says that Mr. Paul Mark okayed and initialed this ad, with some slight change. Is Mr. Mark an appropriate person at ASCAP to authorize an advertisement's use?

A Yes.

Q Who do you understand "they" to be in the phrase, "You own us. They own you."?

A B.M.I. Unless it includes SESAC, too.

Q It says, "The difference between ASCAP and B.M.I. is rather simple" --

A Then why do you ask the question?

Q I want to know whether I misunderstood the ad. Is that advertisement intended to attract B.M.I. affiliates to ASCAP membership?

MR. TOPKIS: I think you might ask that question of the man who formulated the advertisement.

MR. RIFKIND: I am asking why ASCAP paid for the publication of that advertisement, what purpose did ASCAP seek to serve, since he is president of the society and I think he is an appropriate person to ask that of.

MR. TOPKIS: If you want to ask if he knows

about the expenditure of the ad, that's all right. It is directed to B.M.I. members of people who were thinking of joining the organization or anybody else.

MR. RIFKIND: That's your testimony, Mr. Topkis.

MR. TOPKIS: I mean the plain meaning of the English language, which is no more or less than Mr. Adams can tell you about unless you qualify him as the author.

MR. RIFKIND: We have now reviewed a series of advertisements and I can go on and review a series more, all of which to me seem to be addressed to B.M.I. members.

THE WITNESS: No, just a minute. You showed me an ad where I would venture to say fifty per cent have no affiliation; that we attracted.

Q I am asking whether this ad --

A It speaks for itself. This is a competitive market. There is no pretension on anybody's part B.M.I. hasn't attempted to get ASCAP writers. There is no question about that. So, the answer is yes.

Q Yes, ASCAP has attempted to get B.M.I. members?

A Any writer that legally could come over and

* * *

Q What factors did you take into account in revising the schedule?

A The ordinary inflationary indicators of the present economy.

Q A fee based or a percentage of somebody else's revenues --

A I did not say that. You are talking about the fee now.

Q Have you participated in discussions with respect to the percentage that should be sought of the revenues of broadcasters?

A Yes.

Q And what factors have entered into your thinking in determining how to revise those percentages?

A The offer made by the customer.

Q Anything else?

A Whether or not we would be required to audit, whether or not we would undergo additional expense, whether those possibilities would be eliminated, whether they guaranteed if they were late in payment there would be a penalty involved.

These were considerations that helped to establish a rate.

Q Any other factors?

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLAND 7-4580

A Not that I can think of.

Q Did you take into account what BMI was charging?

A No.

Q In determining the fees for general licensees other than general inflation what factors have you taken into account in revising your fee schedule?

A That's pretty much the reason.

Q General inflation?

A Yes.

* * *

Q This is the first occasion on which you have seen the letter?

A Yes. To my recollection it is the first time I have seen it.

Q You didn't see that letter in preparing for this deposition?

A I cannot be sure-- for what?

Q In preparing for this deposition.

A No.

MR. TOPKIS: Are you going to ask the witness any questions about it?

MR. RIFKIND: I am.

MR. TOPKIS: If so, why don't you read it with care?

Q Do I understand correctly, Mr. Adams, that until this moment you have never seen this letter before?

A Yes.

Q You did, however, say that you had heard about the letter?

A Yes.

Q What did you hear about the letter?

A That the contention of the AGAC board was that this was a violation of the bulk license.

Q From whom did you hear that?

A I don't remember.

Q Was it from an ASCAP board member?

A No, I said from the people at AGAC.

Q From whom did you hear about the letter? I am trying to identify the person who spoke to you about this letter.

A I don't know from whom I heard it.

Q In an effort to prod your memory a bit, I am asking you whether you heard it from a member of the ASCAP Board.

A I don't know if I did or not.

Q Do you recall this letter ever being discussed at a meeting of the ASCAP board?

A No.

Q The ASCAP executive committee?

A I don't recall it being discussed within the confines of ASCAP at any committee or board meeting.

Q Do you recall it being discussed outside the confines of ASCAP?

A If I heard about it and discussed it, and if it was not in ASCAP, it must have been outside of ASCAP.

Q Do you know Mr. Burton Lane?

A Surely.

Q Is he a member of the ASCAP advisory committee?

A He is.

Q Did this subject matter of this letter come up at --

A The subject matter of the letter did not come up.

Q Let me finish my question.

-- at a meeting of the ASCAP advisory committee, did it come up?

A As far as I know, it didn't come up.

Q Do you recall about when, in point of time, the subject matter of the letter was mentioned to you?

A No, except judging by the date of the letter it was on or about the time the letter was sent, or shortly thereafter.

Q Whoever it was that mentioned the matter to you, what did he say about it?

A I don't leven know if it was a he, she, or they, or the general discussion. The point that I recall is that there was implicit, at least I was

told, in this letter or in this proposition of 3M for the tapes, a violation of the bulk license clause in the AGAC basic contract.

Q Did the people or person you were speaking to, express any view as to the soundness of the position Mr. Lane was taking?

A No, not soundness except it was a violation of the contract and they wanted to put whoever it was, who had received or was contemplating making a deal, the possibility of violation.

Q That is, the publisher would be violating?

A I don't know. I am just saying that it is the interpretation of the letter, what it was to me.

Q Did the people or the person who was reporting about it to you indicate their own or his own view as to whether there was in fact a violation of the AGAC --

A Not that I recall.

Q Do you recall whether you formulated any opinion of your own as to whether a violation of the AGAC contract was involved?

A Yes.

Q What was that view?

A The view was I had not been consulted and if any of my works were used I would have the publisher consult me as to the rate.

Q As to the rate?

A As to the rate.

Q Was it your view that under the AGAC contract you had a right to be consulted in that fashion?

A Yes.

Q Do you know whether any of your works were used?

A I do.

Q Were they?

A One.

Q Published by which publishing company?

A Consolidated, who used to be Tommy Dorsey, Dorsey Music.

Q Were you consulted by them?

A No.

Q Did you protest to them?

A I got my lawyer subsequently.

Q Mr. DaSylva?

A Yes. And --

MR. TOPKIS: You don't have to talk about

any conversations you had with your lawyer.

A (continuing) Before anything else was done a deal was made between 3M and ASCAP so there was no reason to pursue the matter further.

Q The only work of yours that was used by 3M was used on one or more of the 3M tapes which was under the ASCAP license?

A I think so.

Q Do you recall when it was that you first heard that one of your works was going to be used?

A No.

Q Do you recall how your works were going to be used?

MR. TOPKIS: Or had been used.

Q Do you recall in what circumstances you learned that one of your works was to be or had been used by 3M?

A I think six months later or a year later, whenever the statement time came, that was outlined as part of the royalty statement.

Q Royalty statement from ASCAP?

A No, from the publisher.

Q What sort of royalty was the publisher paying you? A synchronization royalty?

A Whatever the royalty was for the license granted 3M. It was outlined. I don't know the phraseology.

Q Do you remember the name of the work?

A Sure I do.

"There are Such Things."

Q "There are Such Things"?

A Yes.

Q Is it your recollection that the use of that song by 3M on one of its tapes was covered by the ASCAP performance license that was ultimately entered into with 3M?

MR. TOPKIS: Could I have the question back?

(Question read.)

MR. TOPKIS: I am not sure I understand that question.

You mean retroactively?

I would imagine that any performance that was licensed by ASCAP subsequent to 1968 was a licensed performance.

MR. RIFKIND: That is precisely what I am trying to find out.

Let me rephrase the question.

Q Do you understand that the use of the

tape containing your song, the performance of the tape, if you like, was at any time licensed by ASCAP or was it licensed by the publisher?

MR. TOPKIS: If you know.

A I really don't know the answer to that.

Q When you asked Mr. DaSylva to do something, what was it that you wanted him to do for you?

MR. TOPKIS: I think I will direct the witness not to answer.

It seems to me you are intruding into the relationship between the principal and his attorney.

Q At the time you went to see Mr. DaSylva about the use of your song, what did you understand the state of affairs with respect to your song to be? What was the problem that prompted you to consult with Mr. DaSylva?

A I answered the question.

Q Try it again, if you would.

A Why should I try again? I said I felt it was a violation of the bulk deal and I had not been consulted.

Q What was a violation of the bulk deal?

A The publisher making a deal with 3M without

consulting me.

Q It was your understanding then, that Consolidated had entered nito an agreement with 3M for the use of your song, is that correct?

A Yes.

Q Was it your understanding that the publisher had granted 3M a performing license to your song?

A Yes.

Q Did you ever ascertain whether the publisher had in fact granted a performance to your song?

A I got statement which outlined the money and, again, I assumed the deal made with 3M was for performing rights.

If my statement contained money received, I would have to say it was for performing rights.

Q You said you never pursued the matter further because subsequently ASCAP entered into an agreement for licensing with 3M.

What effect did you understand the ASCAP license to have with respect to the performance of your song, a performance license for which had been granted by Consolidated?

A That I would receive the payment for the performance through ASCAP.

Q Did you understand that the ASCAP license to 3M superseded and was substituted for the performance licenses granted to Consolidated?

A I had not thought about that.

Q Then why would you expect to get future performance license royalties from ASCAP rather than Consolidated?

A Becase ASCAP had a license with MMM and if that work was done under the license, ASCAP would pay me for the performance.

Q That is why I am trying to figure out whether it was your understanding that the ASCAP license superseded the Consolidated --

A Mr. Rifkind, I didn't give it that thought.

Q Did you, directly or indirectly, at any time tell anyone at Consolidated, or any representative of Consolidated, that their action with respect to your song ws unauthorized under the AGAC contract?

A No.

Q Did you make any protest to Consolidated concerning their action with respect to your song at MMM?

A No.

Q Did anyone do so in your behalf, to your knowledge?

A Not to my knowledge.

Q Did anyone report to you that they had?

A No.

Q Did you have discussionswith any other writers, composers or lyricists as to their rights under the AGAC contract with respect to bulk licensing?

A No.

Q You testified yesterday that you had been active in what was then SPA, in the working out, hammering out, as I think you put it, of the 1947 AGAC contract. What was the purpose to be served by the Bulk Licensing Provision?

A The purpose?

Q Yes.

A Again, you are sending me back 26 years.

MR. TOPKIS: I take it you mean what led the witness, as he best remembers it, to favor the clause as it was ultimately adopted.

MR. RIFKIND: That is right, or in the alternative in the course of drafting and working on the thing, what were the views expressed by his fellow writers as to why they wanted that sort of a clause.

A I would think that with any reputable publisher in his catalog he has hundreds if not

thousands of works. By the same token, a writer, having worked with the publisher has a few. A publisher can make a deal for the bulk and not particularly care what happens to A, B, C's song, because he makes a deal for his entire catalog.

A writer having only one or two works possibly with that publisher does not feel he is in a favorable condition economically under that set of circumstances. That is the motivation of the genesis as I recall for resistance of allowing a publisher to make a bulk deal.

Q Have there been any developments between the earlier SPA contract worked out in 1937, and 1947, which lent energy and interest to the Bulk Licensing Provision?

A Specific instances?

Q Specific or notorious occurrences which made writers feel that this was an important --

A No, we just happento have very alert writers that anticipate things happening. I don't recall anything, no.

Q Did you familiarize yourself with the terms on which Consolidated licensed your song to MMM?

A No.

Q Do you have any idea of what those terms were?

A No.

Q So you do not know whether those terms were highly advantageous, disadvantageous, desirable or undesirable?

A You better ask me each one in turn.

Q Do you know whether they were advantageous?

A No.

Q You do not know whether they were disadvantageous?

A No.

Q You do not know whether they were desirable?

A Yes. I didn't think it was desirable.

Q Why did you think --

A Because I was not consulted.

Q Sometimes good things happen to one by surprise. Why was it undesirable merely because you were not consulted?

A I pride myself on having some idea what I think something is worth I have written, and it is

not desirable for somebody else to do what I think I can do as well if not better. At least I am consulted about something I create. Parenthood, you know, is a very, very serious thing.

Q Did you, although you were not originally consulted, subsequently inquire into the terms on which your song had been licensed by Consolidated?

A I didn't.

Q Has Consolidated ever granted synchronization rights to one of your songs?

A Not to my recollection.

Q Has Consolidated ever granted mechanical rights to one of your songs?

A Yes.

Q Have they consulted with you before --

A They don't have to. The terms are set out in the contract.

Q Have they granted mechanical rights at less than the statutory two cents?

A Not to my knowledge.

Q Have any of your publisher granted mechanical rights to one of your songs at less than the statutory rights of two cents?

A Again, not to my knowledge.

Q Have any of your publishers granted synchronization rights to any of your songs?

A Yes.

Q Have they, in each instance, consulted with you prior to granting such rights?

A One time not.

Q Was that in derogation of their duties to you?

A I don't know whether the bulk deal was in the contract governing that song, or the obligation on the part of the publisher to consult with the writer, so I would have to examine the contract to be able to answer that question.

Q Is it your understanding that publishers are generally accustomed to consulting with writers before granting synchronization rights?

A I don't know about any other writer. I can only talk about myself.

Q I would suppose you know a lot about other writers. Do you recall the song as to which a publisher didn't consult you on synchronization rights?

A I do.

Q What was the name of that song?

A "What a difference a day makes."

Q When was that written?

A 1934.

Q Have any of your publishers granted motion picture performing rights to any of your songs?

A No, I don't think so.

Q Have any of your songs been performed on television?

A Yes.

Q Were you consulted by anyone prior to that performance?

A License granted to ASCAP.

Q You are still the daddy of that song. I must say I am not clear what the difference is between a bulk license granted by publisher and a blanket license granted by ASCAP.

A I have granted a non-exclusive license to ASCAP of my catalog. I have granted to ASCAP a non-exclusive license.

Q Is there a reason why you would grant such a license to ASCAP, but not to your publisher?

A We have a contract between AGAC, and I

want the publisher to conform to that contract. Beyond that, I haven't given it any thought.

Q You said that you as the father of a song want to be consulted. What is different of a publisher dealing with it and ASCAP dealing with it?

A That is ASCAP's function to collect for performing rights, and I willingly granted them a non-exclusive license, police it, take care of it. I am satisfied in the way they handle my business end of it and that is the reason for it. It is a much broader organization. It has reciprocal agreements with foreign societies and takes care of what today has become the major income of the writer.

Q Your publisher grants some categories or is entitled to grant, as I understand it, some categories of performance rights, namely motion picture performing rights, is that correct?

A No.

Q That is not correct?

A Again, consent must be gotten.

Q Why is your consent a prerequisite to the publisher's licensing activities and not to ASCAP's?

MR. TOPKIS: Isn't all this just a lengthy inquiry between participatory democracy and the other party to a contract?

MR. RIFKIND: Perhaps.

MR. TOPKIS: Why waste time on it?

MR. RIFKIND: I would like to know what the answer is.

MR. TOPKIS: One answer is --

MR. RIFKIND: I would like the witness to answer.

MR. TOPKIS: I am not interested in this point. I would direct the witness not to answer the question. It couldn't be sillier. Yes, it could, but not very much.

Q Mr. Lane also makes the point in this letter, as I understand it, that in addition to violation of the Bulk Licensing Clause of the AGAC contract, there is a violation of that clause which deals with post-1937 uses, that is, uses unknown or not granted by the publisher prior to June 1, 1937.

Did you consider that aspect of the publisher's conduct or Mr. Lane's analysis of the situation?

A No, I didn't.

Q As you think about it now, do you think that there is merit in Mr. Lane's contentions along --

A I told you yesterday, once something is settled, I give no further thought to it.

Q I am asking you to think about it now.

A I would have to take a week or so, maybe more. I am not going to give you an answer on anything like this. I have no answer.

Q Do you now recall any conversation with anyone from November 15 or thereabouts down to today? That is, with respect to the subject matter of Mr. Lane's communication of November 15, 1965?

A To the present?

Q Yes.

A No.

Q Mr. Adams, I show you a letter dated July 6, 1966, from Herman Finkelstein to Allen Arrow, which has previously been identified as Plaintiff's Exhibit 62 for identification, and I ask you whether you have ever seen it before?

A I didn't see this letter, no.

Q You didn't see this letter?

A No.

Q You have not seen it prior to this moment?

A That's right.

Q Did you ever discuss the substance of the letter or problem referred to in it with Mr. Finkelstein?

A Yes.

Q When was that discussion?

A I don't know.

Q Was it, to the best of your recollection at or about the time of this letter?

A I would say that is a fair assumption, yes.

Q Was your discussion with Mr. Finkelstein about the subject matter of this letter before or after the inquiry you received from someone at AGAC about 3M and ASCAP's position?

A I don't remember.

Q Let me go back a step. Was the inquiry you got from someone at AGAC before or after Mr. Lane's letter of November 15, 1965?

A The inquiry -- yes.

Q What is the answer?

A I heard from AGAC about what the posture of AGAC was going to be about MMM prior to when I heard about this letter.

Q Since the letter from Mr. Lane of November 15, 1965, was before the letter from Mr. Finkelstein of July 6, 1966, presumably the inquiry you got from AGAC was prior to Mr. Finkelstein's letter as well, or is that unsound?

A That would seem to be right.

Q Did the inquiry that you got from AGAC, some time prior to November 15,1965, raise the problem of both licensing?

MR. TOPKIS: Excuse me, what is this inquiry from AGAC that you are talking about?

MR. RIFKIND: Mr. Adams testified at the beginning of this morning, that he first heard about MMM via an inquiry from AGAC as to ASCAP's position.

MR. TOPKIS: I understand.

A You just answered the question you asked me. You did it perfectly.

Q That may be, but I don't perceive it. When you received the inquiry from someone at AGAC, did that someone indicate that an area of AGAC's concern was the bulk licensing problem referred to

in Mr. Lane's letter of November 15?

A The inquiry was that some tapes were going to be made by 3M , what would ASCAP's position be on publishers granting performing rights.

Q At the time that inquiry was received, were you aware that there had been any discussions between 3M and ASCAP with respect to the grant of performing rights?

A No.

Q You were not aware of it?

A No.

Q You are now?

A Pardon?

Q You are now aware of that, that there had been discussions prior to that inquiry?

A The letters you showed me from Collins?

Q Exactly.

A Yes.

Q Did you express to the person who made inquiry from AGAC your view as to publishers granting performing rights to 3M?

A I didn't.

Q Did you express your view to Mr. Finkelstein when you referred --

A I referred the conversation to Mr. Finkelstein.

Q In so refsrring it, did you express your view?

A No.

Q You say that at or about the time of Mr. Finkelstein's letter to Allen Arrow on July 6, 1966, you had some discussion with him about the substance or subject matter of this letter?

A Yes.

Q Did you have discussions with anyone else?

A No.

Q What did Mr. Finkelstein say to you and what did you say to Mr. Finkelstein?

MR. TOPKIS: On what occasion?

MR. RIFKIND: In connection with Mr. Finkelstein's letter to Allen Arrow, of July '66.

MR. TOPKIS: If the conversation didn't involve rendering of legal advice, I have no objection.

A Let me see the letter again.

Q The letter in substance refers to Mr. Arrow an inquiry or complaint received from PRS.

A Mr. Finkelstein, as I recall it, discussed the fact that PRS -- that ASCAP was handling the PRS

performing rights in the United States and was so informed by PRS. There was no lengthy discussion about it.

Q What did you say to Mr. Finkelstein about it?

A I listened.

Q And said nothing?

A No.

Q Did either you say to the other this point raised by PR S --

A I didn't hear the first part of the question.

Q Did either you say to Mr. Finkelstein or Mr. Finkelstein say to you that the matter raised by PRS will render more difficult the activities of 3M in acquiring performing rights to its tapes of background music?

A He didn't.

Q Did you?

A No, I didn't.

Q Did Mr. Finkelstein report to you any further developments with respect to the matter raised in his letter to Allen Arrow of July 6, 1966?

A Not that I recall.

Q Did he ever tell you that he had received a reply from Mr. Arrow?

A No.

Q Did he ever tell you that he had received communications from anyone else with respect to the PRS problem?

A No,not that I recall.

Q Down to the time of your discussion with Mr. Finkelstein on the PRS matter, did you have any discussions other than those you have previously identified for us concerning 3M's activities?

A No.

Q Did Mr. Finkelstein ever report to you that he had attended a meeting at AGAC with Burton Lane, Edward Elison, Leon Kellman, and representatives of 3M concerning 3M's activities?

A You asked me the question. I answered it.

Q What is the answer?

A I told you I heard from AGAC and reported that to Finkelstein who set up an appointment and went over to AGAC and had a conversation with them.

Q Did he report to you on the tenor of

that discussion?

A No, he didn't.

Q Did he report to you anything more than the fact that he had attended such a meeting?

A I believe he said he discussed the 3M matter with the people at AGAC but no details.

Q Did he report to you that representatives of 3M were present at that discussion?

A No. Were they? No, he didn't.

Q Did he report to you what the nature of the problem under consideration at his meeting with AGAC was?

A What I told you is all he reported. He discussed the 3M matter without going into details or telling me the cast of characters who were there.

Q Did he tell you what aspect of the 3M matter was discussed?

A He didn't.

Q Did you ever discuss with Mr. Finkelstein or with anyone else the question of whether 3M would be able to continue to produce tapes of background music if it didn't obtain access to the ASCAP repertory?

A No.

Q Did Mr. Finkelstein ever express to you the view that 3M would not be able to produce tapes or continue to produce tapes without such access?

A He didn't.

Q Did you form an opinion on the subject?

A No.

Q Did you ever discuss with Mr. Finkelstein or with anyone else, the question of policing unauthorized uses by 3M's customers?

A I may have.

Q To the best of your recollection, with whom did you discuss --

A Mr. Finkelstein.

Q Did you discuss it with anyone else?

A No.

Q To the best of your recollection, when was the earliest such discussion with Mr. Finkelstein?

A No recollection.

Q To the best of your recollection, was it at or about the time of his letter to PRS?

A I would rather not conjecture.

MR. TOPKIS: His letter to --

MR. RIFKIND: The letter concerning PRS.

Q To the best of your recollection was it before or after his report to you that he had attended a meeting at AGAC, concerning 3M?

A I guess it would be subsequent to it.

MR. TOPKIS: Please don't guess.

A (continuing) I don't know. All of these dates I don't recall.

Q Did Mr. Finkelstein report to you that the subject of Mr. Lane's letter of November 15,1965, had been discussed with representatives of AGAC?

A He didn't.

(recess.)

Q Mr. Adams, did Mr. Finkelstein ever express to you the view that Burton Lane's letter of November 15, 1965, was too mild, and that a more strenuous, vigorous protest should have been made?

A No.

Q Did anyone report to you that he had expressed such a view?

A No.

Q Did Mr. Finkelstein tell you that he had expressed the view that AGAC should have brought suit against publishers who negotiated directly

with 3M?

A Not that I recall.

Q Did anyone report to you that he had expressed that view?

A No.

Q Was that your view?

A I have no view.

Q Did you have a view?

A No, I didn't.

Q Did you have a view at the time you consulted with Mr. DaSylva?

A No.

Q I think you said that the problem you raised with Mr. DaSylva concerning Consolidated was resolved as far as you were concerned because ASCAP granted 3M a license.

MR. TOPKIS: I don't think that was the witness' testimony. He recited merely chronological facts, namely consultation with Mr. DaSylva and the fact ASCAP then entered into an agreement with 3M and he went no further.

MR. RIPKIND: Perhaps I am incorrect, --

Q Perhaps I am incorrect, but in reciting that chronology, Mr. Adams, did you indicate or mean

to indicate that there was a causal relationship, that you went no further because ASCAP granted 3M a license?

MR. TOPKIS: I think the witness has answered that question.

MR. RIFKIND: I don't think he has.

MR. TOPKIS: Then we are in disagreement.

MR. RIFKIND: May I ask it just once more so I won't have to go back to the tape to find out --

MR. TOPKIS: All right.

A I said ASCAP made a deal with 3M and as far as I was concerned there was no reaon to pursue it further with Consolidated.

Q Prior to the time that ASCAP made a deal with 3M, was it your intention to pursue the matter with Consolidated?

A I may have or I might not have. It depended -- that particular time, no.

Q Mr. Adams, in 1966, the letterhead of the American Guild of Actors and Composers lists you as a member of the council?

A No, it does not.

Q It looks that way to me.

A Are there other initials after it?

Q There are. I take it those initials H.C. mean "Honorary member of the council," Nevertheless, you are listed --

MR. TOPKIS: Whatever it says, it says.

Q Did you attend council meetings of AGAC during 1966?

A No.

Q Did you attend any meetings with AGAC during 1966?

A No.

Q During 1966, did anyone at AGAC express to you the hope that an agreement would be reached between 3M and ASCAP?

A To the best of my recollection, the phone call I received, the initial and only phone call was the last time I had any discussion with anybody at AGAC regarding the 3M matter, to my recollection.

Q During 1966, were you aware that Mr. Finkelstein was conducting negotiations with representatives of 3M, looking toward a 3M ASCAP agreement?

MR. TOPKIS: During 1966?

MR. RIFKIND: Correct.

MR. TOPKIS: I don't know that he was.

MR. RIFKIND: That is what I am asking.

A My answer is, leaving aside the year you have mentioned, I knew that he was pursuing or attempting to pursue an agreement with 3M, but I don't know the year.

Q We have seen earlier some discussions in 1964 that apparently took place. The letters from Mr. Collins indicate that. And, at the other end of the chronological period, some time in 1968 an agreement was in fact reached. Do you know whether or not negotiations were continuing intermittently but continuously during the period from 1964 to 1968?

A I do not.

Q If Mr. Finkelstein was conducting negotiations with representatives of 3M in 1966, would he have reported that fact to you?

A Not unless they heat up.

Q Would he have reported it to the negotiating committee or the law committee?

A Same answer.

Q What does "heat up" mean?

A Where you get to a point which looks like the parties might be in the same ball park.

Q How did Mr. Finkelstein know what ball park he was supposed to be in?

A Ask Mr. Finkelstein.

Q Had he been given a guideline, marching orders or instructions as to what ASCAP's board thought the appropriate ball park was for this new use as to which there were not a great deal of precedent?

A Not to my recollection until the time came when I mentioned Herman Finkelstein thought that area had been reached, and then came in for instructions.

Q Mr.Adams, do you recall a meeting held in the ASCAP board of directors room in January of 1968, attended by representatives of 3M, representatives of ASCAP and yourself, concerning a 3M license?

A I remember a meeting when we came to a decision about the 3M deal. If that was the meeting, yes, I recall it.

Q What is your recollection of the principal items under discussion at that meeting?

A I don't have any recollection of the details of it. I know that we came to a deal, but I can't tell you any of the details at all.

Q Do you recall any of the principal problems or stumbling blocks to an agreement which were resolved at that meeting, irrespective of how they were resolved?

A No, I do not.

Q Mr. Adams, do you recall a meeting of the ASCAP board of directors at which it was reported that some of the publishers were members of ASCAP and were represented at that board meeting, had engaged in direct licensing of 3M?

A Yes.

Q What do you recall having been said about that at that meeting?

A Just as you said.

Q Did anyone express any view as to that fact?

A None that I recall, no.

Q Do you recall whether Mr. Brettler expressed any view as to that fact?

A No, I do not.

Q Do you recall whether Mr. Quiante expressed any view?

A I don't recall anybody expressing a view except I heard a report that three or four publishers

had made a deal with 3M. That was your question and that's my answer.

Q Did you express any view?

A No.

Q Did you have any view?

A No.

Q Why was this report made? What business was it of the ASCAP board?

A The report was made by those who made it. You will have to ask them. I didn't ask them for it.

Q Did you say it is very interesting and let's go to the next item?

MR. TOPKIS: That suggests it was an item. I don't believe the record so indicatges.

Q Did you say it is very interesting, let's go on to something else?

MR. TOPKIS: Do you remember what you said?

A I said nothing.

Q Do you recall anyone present expressing disapproval of such activity by publishers?

A I do not.

Q You don't recall any discussion of it at all?

A I just answered you.

Q You don't recall any discussion of the reported fact?

A That's right.

Q Do you recall when the board of ASCAP finally approved a 3M ASCAP license?

MR. TOPKIS: Are you asking the witness the date, or are you asking him whether he recalls the fact?

Q Do you recall that the ASCAP board ultimately approved an agreement, licensing agreement, between 3M and ASCAP?

A Yes.

Q Do you recall approximately when that approval occurred?

A No.

Q Do you recall any of the terms of the agreement that was reached at that time?

A No. Of course, that's on the record.

Q Do you recall whether you formed an opinion as to whether the terms obtained by ASCAP were better than or worse then the terms that any of the publishers had negotiated with 3M previously?

MR. TOPKIS: Better or worse than for whom?

* * *

D 66

231

EXCERPTS FROM THE DEPOSITION ALLEN H. ARROW

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

vs.

: 69 Civ. 5740 (M.E.L.)

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and BROADCAST MUSIC, INC., et al.,

Defendants.

August 4, 1972
10:05 a.m.

Deposition of Minnesota Mining and Manufacturing Company by ALLEN H. ARROW, taken by plaintiff, pursuant to adjournment, at the offices of Orenstein, Arrow, Silverman & Parchor, Esqs., 1370 Avenue of the Americas, New York, New York, before Richard Kaufman, a Certified Shorthand Reporter and Notary Public of the State of New York.

APPEARANCES:

CRAVATH, SWAINE & MOORE, ESQS.,
Attorneys for plaintiff
One Chase Manhattan Plaza
New York, N. Y.
RONALD S. ROLFE, ESQ., of counsel.

PAUL WEISS RIFKIND WHARTON & GARRISON, ESQS.,
Attorneys for defendant ASCAP
345 Park Avenue,
New York, N. Y.
ALLAN BLUMSTEIN, ESQ., of counsel.

- - -

A L L E N H. A R R O W resumed.

EXAMINATION CONTINUED

BY MR. ROLFE:

Q Mr. Arrow, I believe you told me at the last session of our deposition that when you contacted Edwin H. Morris & Company you spoke with a Mr. Harry Gerson, is that correct?

A Yes.

Q Can you recall the date of that conversation?

A No, not precisely.

Q Can you recall whether it was in the

* * *

Kramer subsequent to that memorandum regarding his expressed position in that memorandum?

A Yes. I regarded his first paragraph as having considerable humor in so far as it reads:

"In view of our repeatedly expressed position as stalwarts of ASCAP. . ."

Mr. Lesser, who was the sole stockholder of Frank Music Corp. had refused repeatedly to serve as a member on the board of directors of ASCAP and had refused to have any officer of his company run for office in ASCAP. His attitude had generally been that "It is a great fount of money, but I don't want to be involved."

I thought the statement was beautiful under the circumstances.

Q Did you ask Mr. Kramer whether it was made in jest?

A I don't recall asking him.

Q Did you ask him why they were not entering into a license agreement with 3M?

A No. It was a subject of some embarrassment to me personally, to speak frankly about it, because we regarded the Frank Music catalog as rather important and as containing a number of

selections which 3M could really use.

In addition, it was our private opinion that Frank Music could have used the money at the time. We recognized that the publishers getting in on the ground floor of the 3M project would make the most money, and we were quite anxious that they be involved.

I believe I got the impression at that time that Mr. Kramer's decision was largely that Frank Music Corp. simply did not want to be considered a maverick and just didn't want to enter into the agreement.

Q Did Mr. Kramer tell you whether he had been contacted by any ASCAP director or ASCAP publisher?

A No.

Q Did you offer Frank Music a consultation agreement, which would pay them $22,500, to locate suitable material to be used in the 3M-700 cartride?

A I don't recall.

MR. ROLFE: Would you mark this Plaintiff's Exhibit 44 for identification.

(Photocopy of letter of Minnesota Mining & Manufacturing Company, undated and

* * *

MDeb D 70

EXCERPTS FROM THE DEPOSITION OF AL BRACKMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.	M.E.L. 69 Civ.5740

March 13, 1973
10:10 o'clock a.m.

DEPOSITION OF AL BRACKMAN, taken by Plaintiff, pursuant to subpoena dated September 15, 1972, at the offices of Cravath, Swaine & Moore, Esqs., One Chase Manhattan Plaza, New York, New York 10005, before Molly Danish, a Certified Shorthand Reporter and Notary Public of the State of New York.

APPEARANCES:

CRAVATH, SWAINE & MOORE, ESQS.
Attorneys for Plaintiff
One Chase Manhattan Plaza
New York, New York 10005
BY: ROBERT K. BAKER, ESQ.
J. BARCLAY COLLINS, ESQ., of Counsel

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, ESQS.
Attorneys for Defendant ASCAP
345 Park Avenue
New York, New York 10022
BY: Allan Blumstein, Esq., of Counsel.

HUGHES, HUBBARD & REED, ESQS.
Attorneys for Defendant Broadcast
Music, Inc., et al.
One Wall Street
New York, New York
BY: RICHARD WILE, ESQ., of Counsel.

HOFHEIMER, GARTLIR, GOTTLIEB & GROSS, ESQS.
100 Park Avenue
New York, New York
Attorneys for Essex Music, Inc. and
Hollis Music, Inc.
BY: BERNARD GARTLIR, Esq., of counsel.

ooOoo

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that such deposition my be signed and sworn to before any officer authorized to administer an oath.

AL BRACKMAN, called as a witness by the plaintiff, having been first duly sworn by the notary public, testified as follows:

EXAMINATION BY

MR. BAKER:

Q Would you state your name and address for the record, please?

A Al Brackman, 89 Brookside Drive, Plandome, New York 11030.

Q By whom are you employed, sir?

A The Richmond Organization.

Q That is sometimes referred to as TRO?

A Sometimes; yes.

Q What is your position there?

A General manager.

Q Did you attend college?

A Yes.

Q Where did you go to school?

A City College.

Q What was your degree in?

A No degree.

Q What was your first job connected with the music business?

A At Mills Music.

* * *

A I don't recall. It is not a normal procedure.

MR. WILE: Are you limiting this to small performing rights?

MR. BAKER: Yes.

MR. WILE: That may help the discussion a little.

A No. I don't recall any.

Q You are aware that performance rights are licensed to producers of theatrical motion picture producers through the Harry Fox Agency from time to time?

A Yes. Those are dramatic rights as a rule.

Q You are also aware, are you not, that there was a period during the 1960's in which some publishers licensed performance rights directly to the Minnesota Mining and Manufacturing Corporation?

A Yes.

Q You will understand what I mean if I refer to that corporation as the 3M Company?

A Yes.

Q Were you aware that in the early 1960's the 3M Company licensed performance rights in connection with background music service offered through ASCAP?

A I wasn't aware of it in the early sixties.

I only became aware of it later on.

Q Later in the sixties?

A Mid-sixties.

Q How did you become aware of that?

A We were approached for the use of some of our songs. After much discussion about titles and relating to the songs themselves, we then discovered the terms and conditions were totally unacceptable to us because it required our collecting the writer's share of performances and accounting and paying for that share, which is a matter of principle with us in that we wouldn't have done that.

Q You say you were approached. By whom were you approached?

A I believe the first call came from the Orenstein and Arrow office.

Q Do you recall who at that office?

A It was either Harold Orentstein or Allan Arrow who made the first call.

Q Do you recall approximately when that was?

A In the mid-sixties.

Q Could it have been as early as the Fall of 1964?

A Yes, it could have been.

Q Do you recall what the terms of the proposal were?

A I recall they had the fees divided into two segments, one a mechanical fee and some part of the fee delegated as a performance fee.

They also specified the term of the agreement was for only three years, to which we objected.

Q Why did you object to the term of the agreement being only three years?

A They had no way of guaranteeing stopping the continuing useage after three years. They would not guarantee the recall of the tapes which they were sold outright, so it was a very bad deal, I thought, to take a fee that purported to be for three years and yet would have continuing use much beyond that if someone wanted it.

Q Do you recall whether they were prepared to guarantee the Richomond Organization that they would use a certain number of their songs in the tape?

A Yes.

MR. WILE: Objection as to the form of the question.

Q Do you recall how many songs they offered?

A I don't recall how many. They started up

with a list that eventually diminished to a few titles.

Q I take it that at no time during the 1960's did the Richmond Organization grant performance rights to 3M for use in connection with this background music service?

MR. WILE: Objection to the form of the question.

A No. We never granted them use.

Q Do you know whether, prior to the time you were approached by the 3M Corporation, that corporation had been negotiating with ASCAP for the purpose of obtaining performance rights to certain compositions in the ASCAP catalog?

A No.

Q When you had your discussions with either Mr. Arrow or Mr. Orenstein, did you inquire as to why they had not obtained performance rights through ASCAP?

MR. WILE: Objection to the form of the question.

A I don't think we inquired why. We told them we just did not want to be responsible.

MR. GARTLIR: The answer is No.

A No.

Q Do you recall whether there was one set of

negotiations to include songs from your catalogs in one tape or was this a series of negotiations which went on and off during the period 1964 through 1969?

MR. WILE: Objection to the form of the question.

A It was one tape.

MR. BAKER: I would like to ask the reporter to mark as Plaintiff's Exhibit No. 158 for identification a letter from Mr. Brackman to Mr. Arrow dated May 17, 1965.

(Letter from Mr. Brackman to Mr. Arrow dated May 17, 1965 marked Plaintiff's Exhibit 158 for identification.)

Q Does this refresh your recollection at all as to when these negotiations may have taken place?

A Yes.

Q That would have been in the Spring of 1965?

A Right.

Q Do you recall now whether the initial discussions concerned approximately 15 titles from the catalogs of The Richmond Organization?

A Yes.

Q In this letter it indicates that you requested a copy of the contract?

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLAND 7-4580

A Right.

MR. WILE: Object.

MR. BAKER: Let the letter speak for itself. The letter speaks for itself.

Q Who was Al Shulman?

A Al Shulman was an attorney in our office.

MR. BAKER: I would like to ask the reporter to mark as Plaintiff's Exhibit 159 for identification an interoffice communication from Mr. Brackman to Mr. Mark dated May 20, 1965 with three pages of attachments.

(Interoffice communication from Mr. Brackman to Mr. Mark dated May 20, 1965 marked Plaintiff's Exhibit 159 for identification.)

Q I would like to direct your attention especially to the last two pages which appear to be a list of songs. Do you recall whether these were the songs which you were discussing with representatives of 3M for possible inclusion in one of their tapes?

A Yes.

Q Were these the songs?

A Being discussed? They must have been.

MR. BAKER: I would like to ask the reporter to mark as Plaintiff's Exhibit 160 for identification a letter from Mr. Arrow to Mr. Brackman dated June 21, 1965.

* * *

a mechanical fee as well, and that was a concern to us because we were only being purportedly paid for three years, and here they would have the opportunity to use it much beyond that period.

Q Did any representative of the 3M corporation seek to persuade you that this would not be a service problem because of steps that they might take to assist you in detecting unauthorized performances?

A I don't think so. I don't recall any such conversation.

Q Why did you object to the indemnification provision?

A Because they came to us knowing we controlled these copyrights. We warranted that we owned the copyrights and were capable of licensing our songs, but why should I give a user, anxious to use my material, the indemnification when he knows these are my copyrights?

If there is going to be a lawsuit, he had better share it with me if he wants to use these copyrights. This is a policy we had.

Q Have any of the companies in the Richmond Organization licensed performance rights to producers of motion pictures through the Harry Fox Agency?

A I believe so.

Q You collect those licenses? You collect those license fees?

A I don't think they separate as specific performing fees. I think it is a synchronization fee.

What part is performance and what part is synchronization fee I don't know.

Q In any event, the Fox Agency remits the fee for the combined synchronization and performance rights to you?

A Yes.

Q Do you then pay the writer a proportion of that fee?

A Yes.

Q The Richmond Organization also licenses mechanical rights to phonograph record companies through the Harry Fox organization; is that correct?

A Yes.

Q They remit the amounts payable to you?

A Yes.

Q And you also make that division between writer and publisher?

A Yes.

Q Why would the distribution of the writer's

share of the performance fees paid for performance rights by the 3M Company be any more of a problem than fees paid by the Harry Fox Agency?

A Repeat that, please.

Q I will repeat the question.

You have testified that your companies received from the Harry Fox organization payments made with respect to that organization with respect to the licensing of performance and synchronization rights to motion picture producers.

A Right.

Q You have also testified that you distribute to writers their share of mechanical royalties.

A Right.

Q Resulting from the licensing to phonograph companies.

And you also stated that one of the reasons you were not interested in the 3M proposal in the late Spring and early summer of 1965 was that you did not want to be encumbered to collecting writers' shares of performing fees and paying those shares to writers.

A Right.

Q My question is, why is it any more difficult to pay a share of the amounts distributed by 3M to

writers than it is to pay a unts distributed by Harry Fox to writers?

MR. WILE: Objection to the form of the question.

A Two different usages. In the case of Minnesota Mining, there would be dozens of titles involved. Eventually they said it may be hundreds of titles involved, and we are not geared to pay performing shares through our computing system, nor do we ever want to, because our writer contracts specifically exclude the writer's share of small performing rights.

Q In other words, the contracts as you understand them provide that one of the things the writer reserves to himself,in layman's language, is his share of performing rights?

A Right. Now, in the film I consider that a dramatic right, and in practice we don't license more than one or two films a year; whereas, this Minnesota Mining was purported to us to be a project that might run into accounting and collecting, and accounting and paying out on hundreds of titles eventually if it were successful. This was all in the experimental stage.

Q I would like to show the witness a letter from Mr. Shulman to Mr. Arrow dated July 15, 1965, and

* * *

A Right.

Q Did the Orenstein-Arrow office, and especially Mr. Harold Orenstein, indicate to you, shortly after he received this letter, that he had believed that 3M had an agreement with you, at least an informal agreement with you to use some of the songs?

A There was no agreement. There was a review of the song titles and what they were interested in.

Every time they looked at it they diminished it down, down, down, but there was no agreement. Nothing was firm.

Q Did he represent to you, shortly after he received this letter, that it had been his understanding--

A I don't recall that he pressed anything like that. They weren't really interested in pursuing it.

Q After this rejection of the 3M proposal, were there additional negotiations with respect to other 3M tapes?

A I don't recall any.

Q Let me show you a letter from Mr. Richmond to Mr. Orenstein, which has previously been marked as Plaintiff's Exhibit 48 for identification, and see if this refreshes your recollection in any way.

A Right.

MR. BAKER: I would like to mark the next exhibit and then put the question.

I am going to ask the reporter to mark as Plaintiff's Exhibit 162 for identification a memorandum from Earl Sheldon, with a list of the compositions attached, to what I assume is Mr. Brackman, and ask him if the "Dear Al:" in this memorandum is indeed him.

(Memorandum from Earl Sheldon marked Plaintiff's Exhibit 162 for identification.)

A There is no date on this.

Q There is a date stamped on the third page. That document was produced by your client.

A This is supposedly after we rejected their agreement and they were talking about a new tape.

Q It was also after Mr. Richmond's letter to Mr. Orentsein dated December 20, 1965?

A Right. And they are now down to 24 titles.

Q Does this refresh your recollection as to whether there were any discussions regarding direct licensing of performance rights to 3M after July 15, 1965, when Mr. Shulman sent a letter to Mr. Arrow indicating that they would like to pass up the 3M proposal as a mtter of policy? Do you recall any of these negotiations in late '65 and early '66?

A After the original rejection of their agreement, I believe there was a discussion. As I recall, I think they said they were going to find a way of getting the performances paid through the society.

I think eventually they did it through BMI. That may have stimulated our interest.

Also, I know that of these 24 titles, about 10 or 12 of them are split copyrights and either us or the publisher could have licensed them.

So we entered into a discussion. We would not have effected any agreement if it related to our paying out performance fees to the writers or collecting them.

Q You don't know whether the "Dear Al:" on Plaintiff's Exhibit 162 is Allan Shulman or Al Brackman?

A No.

MR. BAKER: I would like to ask the reporter to mark as Plaintiff's Exhibit 163 for identification a memorandum from Mr. Richmond to Mr. Brackman dated February 14, 1966.

(Memorandum from Mr. Richmond to Mr. Brackman dated February 14, 1966 marked Plaintiff's Exhibit 163 for identification.)

Q The first paragraph refers to the Turk-Ahlart

catalog at Cromwell?

A Right.

Q Can you enlighten me as to what Mr. Richmond was referring to?

A Yes. When I told you before there were split copyrights on this list, this list that Earl Sheldon had sent in the "Dear Al:" letter, most of those split copyrights were shared between Fred Ahlart and ourselves.

Consequently, they were capable of licensing these songs without consulting us, as we were capable of licensing without consulting them.

Apparently they entered into an agreement with 3M, and now there was a question of them notifying us and telling us they would send us half the royalties, because they paid their writer half and we had to pay our writer half.

We did not know whether they were coming as performance or synchronization. They were just going to send us half of what they got.

Q Do I infer correctly from your previous testimony that the Richmond Organization seeks to avoid granting licenses for split copyrights?

MR. WILE: Objection to the form of the

question.

A I don't know. Don't infer that.

Q You said on the list attached to Plaintiff's Exhibit 162 for identification there were a number of split copyrights?

A Right.

Q Did you see any problem with respect to licensing those compositions to 3M? Was there any problem other than the ones you have previously referred to?

A No.

Q Did you ask 3M to exclude those from the list?

A No.

(Recess.)

MR. BAKER: I would like to ask the reporter to mark as Plaintiff's Exhibit 164 for identification a memorandum from Mr. Shulman to Mr. Brackman dated February 2, 1966.

(Memorandum from Mr. Shulman to Mr. Brackman dated February 2, 1966 marked Plaintiff's Exhibit 164 for identification.)

Q Do you recall any discussions with anyone at the Richmond organization relating to Mr. Shulman's request that certain split copyrights --

A He was referring to two different types of songs there, one which is split copyrights.

Q What was the other?

A Well, some of these songs were foreign originated songs where we were only the sub-publisher in the United States. The writers were members of foreign performing societies, PRS, Performing Rights Society in England.

I think he was referring to a question whether we could license the right of share of performing rights of an author who was a member of a foreign performing society whose rights were vested in the society. We only had the rights to license in this country rather than the ownership.

Q With respect to these songs which were from the catalogues of the repertories of foreign societies, he sought to exclude those from the list because you were unsure as to whether the Richmond organization had the right to grant performance licenses to those works; is that correct?

A Right. I would assume that.

MR. GARTLIR: You are asking him something

about Shulman. You are now asking about himself?

MR. BAKER: I am now asking him about himself.

O Subsequent to February 2, 1966 did you ever determine whether you had those rights?

A We discussed it. I don't think we determined anything.

O You never made a decision as to whether you had those rights or not?

A I think we felt we did not have those rights. I am pretty sure.

O The other categories referred to here were split copyrights?

A Yes.

O Did you have any discussions as to why it would be desirable to substitute other songs from the Richmond catalogues for split copyrights?

A No. Unless it was business judgment in that Fred Ahlart had already licensed the songs and they already had control. So we wanted some additional songs used in there.

O Was there any discussion of the inconvenience of having to account to co-publishers of songs?

A There is usually no inconvenience of carrying co-publishers' songs, under normal licensing.

Q Would you regard the licensing of 3M as normal licensing?

A No.

Q Why not?

A When you license a split song on mechanical copyright, meaning for phonograph records, you specify each publisher is to receive directly from the record company his share to share with his writer. So there is no step where one publisher is accounting to another publisher who is accounting to his writer or in reverse, and the Minnesota Mining procedure was completely outside the normal procedure.

Q Did you ever discuss with Minnesota Mining any proposal where they remit a co-publisher's share directly to him?

A We never even got that far in the discussions with them. They had already made deals with other publishers.

Q This proposal which you were discussing in late 1965 and early 1966, do you recall what disposition there was of that proposal?

A Which proposal? For the use of these songs? Which proposal was that?

Q The proposal for the use of the songs listed on

mdh 4 Brackman

Plaintiff's Exhibit 162 for identification.

A And had we discussed --

O Do you recall whether any deal was made?

A No deal was made.

O Do you know why?

A I think it just phased out. They had a time schedule and we objected to their contract base they were trying to work out, and I think because of the deadline to be met the whole thing was phased out.

MR. BAKER: Let me ask the reporter to mark as Plaintiff's Exhibit 165 for identification a memorandum from Mr. Richmond to Mr. Brackman dated February 17, 1966.

(Memorandum dated February 17, 1966, from Mr. Richmond to Mr. Brackman, marked Plaintiff's Exhibit 165 for identification.)

MR. BAKER: So you can consider these together, I will ask the report to mark this as Plaintiff's Exhibit 166. Mark as Plaintiff's Exhibit 166 for identification a memorandum from Mr. Brackman to Mr. Richmond, dated February 25, 1966.

(Memorandum dated February 25, 1966, from Mr. Brackman to Mr. Richmond, marked Plaintiff's Exhibit 166 for identification.)

O I would also like you to read Plaintiff's Exhibit

* * *

discussions you may have had with your attorneys, is that conclusion based upon any other discussions or documents?

A No.

MR. BAKER: I would like to ask the reporter to mark as Plaintiff's Exhibit 167 for identification a batch of documents which include a memo from Alan Shulman to what I assume is his secretary or file clerk, someone of that nature, appended to which is a memorandum from Mr. Brackman to Mr. Richmond relating to a letter apparently received from AGAC on or around November 17, 1965; a copy of that letter is also appended.

xx (Batch of documents marked Plaintiff's Exhibit 167 for identification.)

Q Did you have occasion to discuss this letter with anyone at the Richmond Organization after it came in?

A Yes, I probably bucked it to Al Shulman.

Q Did you discuss it with Mr. Richmond?

A I must have mentioned it to him.

Q Do you recall the substance of those discussions?

A They were not of too much concern to us, because in any instance we were more concerned with the relationship between our writers and ourselves with respect to other terms and conditions of Minnesota Mining's

agreement. On the list here I notice there are only two songs under an AGAC agreement. So I don't think we would have made much of a point other than taking note of it.

Q Can you tell me how many songs in the list appended to Plaintiff's Exhibit 159 are subject to the AGAC agreement?

A I think there are only two songs out of these 25 that were under AGAC agreements.

Q Was this letter from AGAC discussed in connection with the negotiations which occurred during December of 1965 and January and February of 1966?

A No.

Q Did you have any discussions with anyone not employed by the Richmond Organization regarding the licensing of the 3M Corporation, other than counsel in connection with this deposition?

A No.

Q Did you ever attend a meeting at AGAC regarding AGAC's position with respect to the licensing of performance rights by publishers directly to 3M?

A No.

Q Do you know whether anyone within the Richmond Organization attended such meeting?

mdh 10 Brackman

A no.

Q No, you don't know, or no, they didn't?

A I don't know, and nobody attended.

Q Do you recall any discussion within the industry -- and I am talking about the publishing industry or the musical industry -- regarding the desirability of the practice of licensing performance rights directly to the 3M Corporation?

MR. BLUMSTEIN: Objection to the form.

A No.

Q Did Mr. Richmond ever discuss with you whether this practice was good or bad for the industry as a whole?

MR. BLUMSTEIN: Objection to the form.

A No.

MR. BAKER: I would like to ask the reporter to mark as Plaintiff's Exhibit 168 for identification a memorandum from Mr. Richmond to Mr. Shulman, with a copy to ALB, dated November 19, 1965.

(Memorandum dated November 19, 1965, from Mr. Richmond to Mr. Shulman, marked Plaintiff's Exhibit 168 for identification.)

Q Do you recall receiving a copy of this memorandum?

A Not really.

Q There is a reference made here by Mr. Richmond

* * *

A Yes, I had discussions.

Q Do you recall the substance of those discussions?

A Yes.

Q Can you tell me the substance of those discussions?

A Well, I repeated them a number of times. At that time restrictions in our songwriters' contracts specified performing fees, it was of considerable concern to me and the ability to proceed under the proposal made by Minnesota Mining. The form of accounting would require a complete adjustment of our computers. That was secondary, because I was thoroughly convinced at all times that we could not undertake to license the writers share of performing fees.

Q This is irrespective of whether the Richmond Organization companies agreement with thewriter is on the AGAC form or some other form?

A Right.

Q In the second paragaph of this memorandum Mr. Richmond suggests that he and Mr. Shulman get together with you for a discussion so that "we can put Harold Orenstein on notice with a friendly but firm letter, so that nothing goes ahead until there is an industry decision." Do you know what he was referring to when he

said "until there is an industry decision"?

A No.

MR. WILE: Objection to the form of the question.

O He never discussed with you what he meant by that phrase?

A No.

O After the negotiations which apparently took place in late December of 1965, January and February of 1966, do you know whether there were subsequent to that time other negotiations regarding the licensing of performance rights from the Richmond catalogues?

MR. WILE: Objection to the form of the question. To whom? What are you talking about?

MR. BLUMSTEIN: With 3M?

O With 3M.

A Would you repeat thequestion?

(Record read.)

O I will rephrase the question. Do you recall whether after the negotiations which occurred in late 1965 and Janary and February of 1966 fizzled out there were subsequent negotiations with the 3M Corporation regarding the licensing of performance rights for background music services which 3M was then making available from the Richmond Organization catalogue?

* * *

A I really don't recall.

MR. BAKER: I will have it marked as Plaintiff's Exhibit 169 for identifcation.

(Letter dated November 1, 1966, from Mr. Brackman to Mr. Arrow, marked Plaintiff's Exhibit 169 for identification.)

Q Between November of 1966 and July of 1969, did you or anyone else on behalf of Richmond Organization, to your knowledge, have any discussions with the 3M Corporation regarding the licensing of either performance rights or mechanical rights to the 3M Corporation?

A I don't recall such discussions.

Q Do you recall whether ASCAP and 3M came to an agreement during that period on the licensing of performance rights?

A No.

MR. BAKER: I will ask the reporter to mark as Plaintiff's Exhibit 170 for identification a letter dated July 1, 1969, from Peter Thall to Mr. Brackman, and note for the record that Mr. Thall appears to be associated with the Arrow firm.

(Letter dated July 1, 1969 from Mr. Thall to Mr. Brackman marked Plaintiff's Exhibit 170 for identification.)

(Discussion off the record.)

(Luncheon recess commenced at 12:30 p.m.)

AFTERNOON SESSION

2:30 p.m.

A L B R A C K M A N, resumed:

EXAMINATION BY MR. BAKER (continued)

Q With respect to Plaintiff's Exhibit 170 for identification, does this refresh your recollection in any way as to negotiations in 1969 concerning the mechanical rights licensed to 3M used in connection with background music service?

A Yes.

Q Do you recall whether someone from the Richmond Organization approached 3M or they approached you in connection with these discussions?

A I don't recall. There is a letter.

Q November 1, 1966?

A Yes; and this is 1968, three years later.

Q My guess would be there may not have been any connection between the two.

A I doubt it.

Q Do you recall whether an agreement was reached with 3M regarding mechanical rights for the M-1200 program?

A I doubt if an agreement was reached. It

wasn't signed.

Q This one certainly isn't signed.

A No, we never had an agreement.

Q So that as far as you can recall none of the companies in the Richmond Organization granted mechanical rights licenses to 3M in connection with the discussions surrounding this letter?

A No, none of them did.

Q Is Mr. Richmond still with the company?

A Yes.

Q What is his position?

A He has been more or less an absentee owner for many years.

Q He hasn't been active in the company in the last three or four years?

A No.

Q Is he an officer of the company?

A Yes.

(Discussion off the record.)

Q Could you identify the companies of which he is an officer?

A Not really. I would assume it is Cromwell--I'm not sure about this. He would probably be an

officer of Cromwell, Essex, Ludlow, Hollis.

Q But he takes no active part in the administration of the catalogs of these companies today?

A No.

Q Does he take part in policy decisions regarding--

A Not in the last several years.

Q Does he own a preponderance of the stock of these companies?

MR.BLUMSTEIN: I will object to that question and instruct thewitness not to answer that.

Off the record.

Q Mr. Brackman, are you and Mr. Richmond or those among which he may have distributed his interestes the principal stockholders of these companies?

A Yes.

Q Your present title is general manager?

A Yes.

Q Would that be roughly the equivalent of a chief executive officer of the group?

A Yes.

Q You are responsible for all phases of their operation ultimately?

***

mdg 11 Brackman

***

Q What are the advantages of being a member of the NMPA?

MR. WILE: Objection to the form of the question.

A Do you really want to know?

Q Sure.

A Are you familiar with CBS records and accounting systems?

Q I am very happy to say I am not.

A Would you be surprised to know, not particularly CBS, but including CBS, that more than 10 per cent of all the income received by the Harry Fox Agency is done through auditing the books of record companies. Each major record company is audited at least once every two years. Out of each audit they are able to find income approximately 10 per cent or more for which the record companies have neglected to account and pay.

Q This auditing function is something which the Harry Fox Agency performs?

A Yes.

Q Is it necessary to be a member of the NMPA to utilize the services of the Fox Agency?

***

***

If the teacher wants to use a song in school and make 50 mimeograph copies of it, I am delighted to let the kids have the song.

Q But not a commercial user like Warner Bros.?

A I don't recall every giving the commercial users a free license.

Q Other than the operations of the Harry Fox Agency, what does the NMPA do for the members of that organization?

MR. BLUMSTEIN: Object to the form.

You may answer.

A Well, they keep tabs on legislation related to the music industry. They keep tabs on postal rates. They support many educational and classical music institutions, and things of that sort.

They make available a service bureau through the uses of music which I imagine is possibly their most important function.

Q Do they ever enter into negotiations on behalf of publishers with organizations such as AGAC or CLGA regarding standard forms of agreement?

A Not while I have been there, they haven't.

Q Are there committees of the Board of

***

***

A You mean the CBS lawsuit?

Q Yes.

A No.

Q Were you aware that some time ago in NBC they requested from ASCAP and BMI a license, in the case of ASCAP, limited to 2217 compositions plus certain background musical libraries?

A I reas something about that in the trade pepers.

Q Do you recall any discussions at NMPA board meetings regarding that subject?

A No.

Q Other than your counsel, have you had any discussions with other people in the music business regarding that subject?

A No.

Q Have you had any discussions with other people in the music business regarding the subject of this lawsuit, other than counsel?

A Other than counsel, no.

Q Are you at all familiar with the terms on which ASCAP licenses music to users such as television stations and networks?

A Not in detail; maybe in principle.

Q Have you heard the term "blanket license" before?

A Yes.

Q What is your understanding of "blanket license"?

A I understand a "blanket license" is when they pay a set fee and can use as much music as they want.

Q Have you heard the term "per program" license?

A Yes.

Q What is your understanding of that type of license?

A That they use the music only when they use it. They pay for the music only when they use it.

Q Within a particular program?

A Yes.

Q Do you know whether ASCAP or BMI has ever issued a license to a broadcaster other than per program or blanket license?

A I don't understand the question.

Q Do you know whether ASCAP or BMI has ever granted to any broadcaster a license other than a

MR. WILE: Let me note my objection to the form of the question. We have only had testimony as to the witness's understanding of what a per program license is.

MR. BAKER: For the purposes of this question, I am willing to take the witness's understanding.

A Let me understand what I am trying to understand.

You are saying it well but I am trying to understand it.

You are saying do I have any knowledge of whether ASCAP or BMI has licensed on a blanket or per program, either or both?

Q Other than--

A Other than blanket or per program? What other one is there besides the two? I don't know. I have no recollection of there being any other.

Q Are you familiar with the term "per use" license?

A How is that differentiated from per program license?

Q A per use license would be a license under which the user would pay ASCAP, for example, on the

basis of the amount of music, among other things, which it used from the ASCAP repertoire or repertory, which it had not licensed directly from the publisher or writer in interest.

A And that is per use?

Q Yes.

A How is that different from per program?

Q A per program license provides that should a broadcaster, an ASCAP per program license provides that if a broadcaster uses one song from the ASCAP repertory which it has not licensed directly from the publisher, or writer, then it must be a certain amount of money, usually indicated by a formula, a certain percentage of time income.

It pays the same amount of money whether it uses three, or four, or five songs on that program.

Under a per use license it would be possible for the broadcaster to license five songs directly and license five songs from ASCAP and pay only with respect to those five songs.

MR. WILE: The five it did not license directly?

MR. BAKER: That is correct.

***

MR. WILE: I object to the form of the question. At what time, in discussions with the network, in internal discussions?

Q Did the Big 3 organization ever consider approaching the networks directly in licensing?

A I don't know.

Q Suppose that CPS announced that beginning January 1, 1974, it would no longer have an ASCAP license, and that it would obtain all of the rights to music used in its programing directly from publishers and writers; and a month or so later the packager of a CBS program called you and said, "I'm doing a pilot on a series to be run to begin in February of 1974, and I would like to obtain from you a performance right license to composition X which is in your catalog," what would you tell that packager?

MR. BLUMSTEIN: Could you amend the package to include BMI?

MR. BAKER: Yes.

Q Would not take an ASCAP or BMI license.

A What would I do?

Q Yes.

A I really don't know what I would do. I

really don't. I would have to know a lot more about the usage, why they don't go to the Society which is a trade practice for so many years. It is traditional.

I think it would be mostly the usage, for how long a period of time they would want that usage.

Q Suppose they want the right to run the program twice on the network within a period of one year; it is in an adventure series program; it is a night club scene.

A Well, if it is on film, there is a synchronization license as well as a performance license.

I would have to know a lot more, really.

Q What else would you want to know about it?

A The usage, is it going to be sung, is it visual-vocal, visual-instrumental, background-vocal.

Q It is a visual-vocal.

A Even before all that I guess I would have to determine, as I do in all cases, whether I am capable of licensing it directly.

I consider that I haven't secured such performing rights from my writers; not at least their share of the performing rights.

Q What relevance would it have to you as to

why the networks decided not to deal with BMI or ASCAP?

You said you wanted to know why they were no longer obtaining the rights from ASCAP or BMI.

MR. WILE: I object to the form of the question. That can't be specified without saying the reason why CBS be licensed through BMI or ASCAP.

MR. BAKER: It is just curiosity.

Q Do you think that such a development would be good for your company?

MR. BLUMSTEIN: Object to the form of the question.

A I don't know. I would be very suspect if a company came to me directly.

Q Can you tell me why you would be suspect of the company which came to you directly?

A Every time a user comes to you directly you wind up getting less than you started out with, particularly when they are a big conglommerate.

Q You mean less for the performance rights than you were getting before?

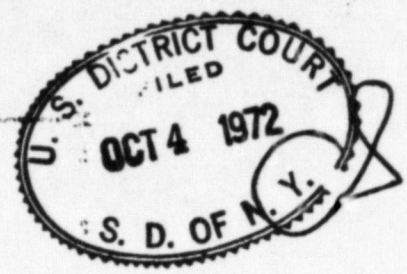
A Whether it is performances, or mechanical, or any other form of revenue.

Q Do you think you do better on mechanical dealing with the Harry Fox Agency?

D 111

EXCERPTS FROM THE DEPOSITION OF LEON BRETTLER TAKEN BY PLAINTIFF.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

vs. vs. : 69 Civ. 5740 (M.E.L.)

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and BROADCAST MUSIC, INC., et al.,

Defendants.

August 16, 1972,
10:25 a.m.

Deposition of Shapiro, Bernstein & Co., Inc., by LEON BRETTLER, taken by plaintiff, pursuant to notice dated October 8, 1971, at the offices of Cravath, Swaine & Moore, Esqs., One Chase Manhattan Plaza, New York, New York, before Joseph Quinones, a Notary Public of the State of New York.

APPEARANCES:

CRAVATH, SWAINE & MOORE, ESQS.,
Attorneys for Plaintiff
One Chase Manhattan Plaza
New York, New York 10005
BY: ALAN J. HRUSKA, ESQ.,
ROBERT K. BAKER, ESQ.,
of Counsel

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, ESQS.,
Attorneys for Defendant ASCAP
345 Park Avenue,
New York, New York 10022
BY: ALLAN BLUMSTEIN, ESQ.,
of Counsel

- -

L E O N B R E T T L E R, being first duly sworn by the Notary Public, testified as follows:

EXAMINATION BY MR. HRUSKA:

Q What is your full name and address?

A Leon Brettler, 33 Asper Road, Scarsdale, New York.

Q What is your present position, Mr. Brettler?

A Executive vice president of Shapiro, Bernstein & Co., Inc.

Q Who is the chief executive officer of Shapiro, Bernstein?

A I am the executive vice president.

* * *

* * *

both understand each other, a rather formal document espousing a particular philosophy, but over the years in my daily work and day to day routine I am quite sure I have written innumerable letters to this one and that one about performing rights, we have dealt with advertising agencies, writers, foreign publishers and so forth. It's a very much part -- it's an important part of music publishing. It's an important part of my daily thinking.

Q I understand. I am really getting at something broader than a writing limited to one man or one company or one composition, that sort of thing. In other words, an industry view or a market view.

A No, I just don't recall ever having done that. Certainly within the last three, four, five years I can almost categorically say I haven't.

Q When did you joint Shapiro Bernstein?

A 1956.

Q What did you do before 1956?

A I was in the construction business.

Q At no time prior to '56 were you in

in the music publishing business?

A No.

Q How did you come to Shapiro Bernstein?

A Well, Louis Bernstein who is president of Shapiro Bernstein liked me, thought he could use me and we came together on it.

Q What position did you start at in Shapiro Bernstein?

A I started as vice president. I have been vice president for 16 years. I haven't made president or chairman of the board yet.

It was mostly because there were a lot of documents that had to be signed by an officer of the company and they needed somebody.

Q When did you become executive vice president?

A I don't know, maybe 1963, something like that.

Q Can you give me kind of a narrative description of Shapiro Bernstein in terms of who owns it, who are the subsidiaries, who are the affiliated companies, how is it organized? That would save me a lot of questions.

A It would be easier if you ask the

* * *

Q I don't think I have the specific answer to the question I asked you. The question is: Would Shapiro, Bernstein have the right under one of these contracts to license music directly to a broadcaster?

A I would say yes, we do, because the way these contracts are structured we are instructed -- we are contracted to a situation, be it an assignment of the copyright for the United States or management, to function in accordance with the laws of the United States, the copyright laws of the United States, the practices of our own firm and the established practices in the industry, and one of the established practices in the industry is that you are a member of ASCAP and/or BMI and/or SESAC and under -- let's take the rules of ASCAP. Under the rules of ASCAP any member of ASCAP -- let's say under the structure of ASCAP a member joins ASCAP and gives ASCAP the nonexclusive performing right to his musical compositions. Becasue ASCAP has it nonexclusively any member of ASCAP has the right to deal directly with any user if he so sees fit. There is little question in my mind, speaking on the broad scale regarding our contracts with all our

foreign publishing firms, that we would have the right without any problem or difficulty whatsoever to deal direct if we so see fit. There might be some exceptions that I can't think of offhand. I just don't want to say I guarantee it but I can say with great confidence that certainly with regard to the overwhelming majority of songs that we are talking about in our catalog we have the right to deal directly with the user.

Q With about how many foreign publishing companies does Shapiro, Bernstein have contracts?

A We are an old company. We go back to the turn of the century and I really doubt if there is a foreign publishing company in the major publishing territories of the world that we haven't had some relationship with in terms of placing songs and acquiring songs. If I had to take a guess on it, it would be a modified wild guess, it is in the neighborhood of 100 or more, and probably more.

Q Currently in existence, currently operating?

A Currently existing or we are dealing with a successor to whoever we dealt with in 1910.

Q What about if the foreign publisher is

* * *

promotion people, who are busy fellows -- I might draw the analogy that they are busy bumble bees who go from flower to flower and polonize the flowers and the records with factual and truthful information that helps keep the wheels turning both for the benefit of the broadcasters who get on to hit records and don't play the, shall I say, flops because someone on the station likes it but it isn't happening anywhere else in the country.

It's always a job to get the first play of a record because radio stations like to play things that they have a feeling across America something is happening with. There aren't too many completely innovative radio stations. They just play anything mailed in to them. That is understandable though.

So this cross polonization exists for the benefit, as I said, of the broadcasters and the record company and the artists and the benefit of the publishers.

Q If I understand this correctly, the main object or target for the polonization is the radio station or the radio disc jockey, the fellow

or the director, the program director for the radio program that is going to play the song?

A Well, you said the main and I might agree with the main, but for every rule there are lots of exceptions.

Q I understand that.

A Very often a guest artist on a television show will do his last hit and say, "I am going to do my next one being released on XYZ Company next week," and he would kick off his record that way. There have been some classic cases of songs in one or two television shots live that became most instantaneous hits, the mail was tremendous. Somebody went into a recording studio and did it and released it as a commercial record.

Q Like the Beetles' Jude, for example?

A I don't think the Beetles did Jude anywhere.

Q It was on Ed Sullivan.

A Maybe it was or maybe it wasn't. If you are pressing me for a like, I might say from my own experience, Barbra Streisand had a special where she did Second Hand Rose and something clicked because something happened. You clients, we

couldn't exist without them, they went in and recorded Barbra Streisand on Second Hand Rose and it was an enormous smash, and it was her television spectacular that did this.

Q After all the work is done, the promotion work, the work by the music publisher, the work by the record company, the work by these independent agencies or agents who are brought into the picture, is it fair to say that generally speaking the composition takes off, becomes a hit --

A It is more fair to say that generally --

Q Please let me finish the question -- the composition becomes a hit because the radio stations start playing that song with some frequency?

MR. BLUM: I will object to the form of the question. You can answer it if you can.

Q I understand there are exceptions to every rule but I am trying to get to the nexus of this.

A Songs today are presented to the public by audio means, by records. Years ago before records, before radio and television, publishers had song pluggers that literally went into Woolworth's and the sheet music stores and sat there with

tinkling pianos and played new songs.

Q I have seen the movies.

A People went in and bought the sheet music. Today we only sell sheet music after the record became a hit. It is impossible in an era of mass communications to do it any other way than through getting broadcasts, both radio and television, of your songs.

There are other ways. If you have a Broadway show, the kickoff of the Broadway show might inspire terrific response from critics and so forth and people might start reading about a great score and get interested in it and curious about it.

But you said -- I think you said by and large.

Q I did, yes.

A By and large across the board -- and I have to answer that by and large across the board -- radio and television broadcasts of songs are really essential in getting them to be hits. The record companies certainly find the same thing. Columbia Records, your own division, works very, very diligently. They have an enormous staff of promotion people and pluggers to get their songs or

to get the Columbia Record Company's recordings out across the length and breadth of America to the radio stations.

Q How much promotion do you direct to television stations?

A Not as much as we do to radio stations. We might be instrumental, for example, if we have a record out with an artist that we are friendly with and know, I might go to one of my friends -- when Ed Sullivan had his show -- and say, "You ought to try to get this fellow on Sullivan," and from time to time we have been somewhat instrumental in organizing this. It is not the easiest thing in the world. Television producers are pretty bright and hip and they know pretty much what is happening.

Some of the night shows, like Johnny Carson and so forth, if I mention some of your client's competitors, we promote television indirectly because we promote our catalog to the producers of television shows, try to get our music used wherever possible. When we have the good fortune to have a hit record by any artist we know that that artist has a very good chance of doing some live

* * *

specialization in the music field?

A I think there is a growing specialization in the music field because of the so-called self-contained groups that write, produce -- write and produce their own material with themselves as the artists.

Q But even beyond the self-contained group, don't you see specialization growing in the music business?

A Well, you can go company by company. Would you ask me that question about your client's record company, CBS Records? Is there a specialization in CBS Records?

Q Can you do this in an overview industry basis?

A The more overview I see, the more general and the less realistic it gets. Let's get back to CBS Records and analyze CBS Records. After all, CBS Records is probably the largest, most influential and most important record company in the United States today, in my opinion. I don't know -- CBS has never flattered me by giving me their profit and loss statement for their record division. But it is generally around the business by the artist

roster, by the volume of records sold, that CBS Records is probably the largest record company in terms of its sales, impact and what have you.

Frankly, I don't see any specialization in CBS. I see CBS covering all bases. You have a classical line, you have a country line, you have rock and roll, you have all kinds of new groups in hard rock and soft rock coming up. They operate on the West Coast, in Nashville and in New York.

Starting with CBS, no, I don't see any specialization, although there might be some specialization in the people.

John Hammond handles classical work. I don't think it would be used to produce a young rock and roll session. Although I wouldn't be surprised if he could do a bang-up job. Maybe CBS is missing the boat by not doing that.

You are making a hell of a fortune in going through your archives and bringing out the Bessie Smiths and the old people that would have disappeared if it weren't for him putting these packages together.

Q Do you think that large phonograph record

* * *

ASCAP or BMI and they form a publishing company under another name and you can be John Jones the writer and Ajax Music is your publishing company and you register Ajax Music with either ASCAP or BMI. So you collect the two cents. One cent goes to you as the writer and one cent goes to you as the publisher. You collect the writer-publisher share of the writing fees and of synchronization, foreign, everything.

Q In your contracts with writers whose music you represent, that is publishers, are you obligated before licensing the performance right to any such music to obtain the consent of the writer?

A Let's see if I have this straight. Are we obligated to obtain the consent of the writer before licensing performing rights?

Q Yes.

MR. BLUMSTEIN: You mean licensing performing rights outside of ASCAP?

MR. HRUSKA: Yes.

MR. BLUMSTEIN: In other words, direct licenses to users?

MR. HRUSKA: Right.

jqr10 Brettler

MR. BLUMSTEIN: Or is the case of BMI -- well, BMI gets exclusive rights. It would be ASCAP.

MR. BRUSKA: Right.

MR. BLUMSTEIN: Do you understand the question?

THE WITNESS: Yes.

To state it once more, are we obligated across the board in a general sense, not talking about specific variations, to get the consent of our writers before licensing performing rights directly?

Q Yes.

A I don't think so. I don't think we have an obligation to get the consent of writers before licensing direct. But I may be wrong. I am not a lawyer. You are asking me this off the top of my head and --

Q What is one reason we would like to see the contract.

A I would like the privilege of some day coming back here and saying I made a boo-boo, there is a technicality --

Q Do you use the AGAC form of contract at

all?

A We do with any writer who is a member of AGAC, we use the AGAC contract.

Q Do you know roughly how many writers you have that are members of AGAC?

A Since the inception?

Q Yes.

A No, I don't know.

Q Or now currently has.

A I can make a fairly educated guess of something like six or seven hundred.

Q Do you know how many members there are all told in AGAC?

A No.

Q Did we define AGAC, the American Guild of Authors and Composers?

A Yes.

Q So that with at least those six or seven hundred writers you would have AGAC contracts

A Yes.

MR. BRUSKIN: I ask the reporter to mark as Plaintiff's Exhibit 53 for identification a form of contract published by AGAC.

(Form of contract marked PX Exhibit 53

xx

***

***

interpret the agreement. I want to know if it refreshes his recollection on this subject.

A It doesn't refresh my recollection. I didn't have when we were talking about it and my answer still remains the way I gave it.

Q You still think that you have got the right to license music to any and all users directly without the consent of the writers?

A Did we say any and all users?

Q Let's say it now.

A No, not any and all users. Maybe this is correct that it has jogged my recollection of this rather obscure boiler plate that runs a good six inches of closely typed space. The way I would function is when something that isn't really run of the mill or routine, take a songwriter we know of who is under an ASCAP contract. We want to get a contract, my firm places it with ASCAP and BMI. Somebody comes in and we know we can print it up as sheet music and we do all these things.

I know this consultant will regarding the day to day run of the [illegible] and as far as the mundane decisions we have to make in the operations of our business. I am not aware that most of our

people on our staff would know this also. When something unusual comes up, whatever it may be, someone wanting rights by satellite to beam to the moon, to start with the absurd and get down to the realistic, someone wanting a direct performing rights grant from us or let's say someone wanting a grant right from us instead of a small right, I would go rushing to an attorney. I would look at the contract myself and if it wasn't crystal clear I would go to an attorney for a decision.

Someone wanting a run of the mill direct performing license from us, I would certainly look at the contract, be sufficiently alerted that this is not a run of the mill daily occurrence and that I better check and think and lookat the contract, the AGAC contract and some of our other agreements and consult with an attorney who has had more experience at reading, interpreting these kinds of documents than I have.

Q This agreement provides for obtaining consent from writers in the licensing of performance rights directly for television use. Do you know whether that sort of provision, a provision of the same substance, is in many of your other

contracts with writers, your non AGAC contracts?

MR. BLUMSTEIN: I am going to object to the form of the question. Answer it if you can, Mr. Brettler.

THE WITNESS: There is some confusion. I don't know why you objected to the form of the question because maybe you read my mind that I didn't quite grasp the question.

Q Whenever you don't grasp the question tell me.

A I was concentrating on the question and trying to find out what part of the contract you were talking about.

Q There is a provision in this contract which in substance requires the publisher to obtain consents of the writers before granting any performance right for television use.

A Would you stop there for a minute?

Q Of course.

A Which provision are you talking about?

Q Look at 4K.

A The substance of this is that unless the publisher and writer have granted to a small performing rights licensing organization, this means

ASCAP and BMI, the said rights, it's agreed no license shall be granted without the consent in each instance of the writer for the use of the composition by use of television or by any means or for any purposes not commercially established or for which licenses were not granted by the publishers on musical compositions published prior to 1937. Now that I have read it I will try to understand it.

MR. BLUMSTEIN: There is a particular provision in the AGAC contract that refers to performing rights. There is a provision inthe AGAC contract which relates to the subject of the direct licensing of performance rights for use to television without trying to characterize it in any fashion or another.

Is the question to Mr. Brettler does Shapiro Bernstein in its contracts with writers which are not AGAC contracts have comparable, similar analogous provisions?

MR. HRUSKA: Yes.

THE WITNESS: Our contracts have been changed and modified over the years. The company goes back to the turn of the century and I

probably am not familiar with all the contracts we have in the old days but I am relatively familiar with the contracts we have now. I would characterize it in a general sense that our non-AGAC contracts in certain areas are not quite as restrictive on us as the AGAC contract but I also would like to say that there are times when we have given a writer of considerable note and prominence who is not a member of AGAC our contract and his attorney and business manager have come in with an addenda to our contract that was longer than our contract.

So hidden away in our files on a song by song issue could be certain booby traps that could affect my answer on this.

Q How many non-AGAC writers do you have now?

A On our books?

Q Yes.

A Well, we probably have a good -- again I havent counted them. I am going by my instinctive feeling on royalty statements I have seen go out, a big batch going to AGAC becauee they collect for AGAC members and another batch going into the mail

* * *

A It has been in force for a long time. The whole AGAC contract has been in force for a long time.

Q When you license performance rights and synch rights to motion picture producers do you, as a matter of practice, communicate with the writer of the music involved and ask his permission?

A As a matter of practice, over the years we have built up different kinds of relationships with writers. Some are very close personal friends and some I just know as names on my books. Mr. Voltter has some who are his close personal friends. We have had some, unfortunately, where the relationship has not been as friendly and cordial as we all would prefer.

I can't give you a yes-no categorical answer on this thing. In many cases we have called up a writer and said "Look, wow, they are going a movie and we think they have come to us for a quotation. You are out there in California and you know them, go find out, bird dog it for us, who really is involved in this thing."

You see, when these quotations come in they might say "We want to use a minute and a

half as a visual local."

Fox reports it back to us and we say "Who is going to synch it?"

We try to get an idea of how important it is, how it will be used so that the price we come up with is commensurate with where and how it is used. From time to time we have been badly misled and I might even say a word that I can't think of that is very close to cheated by producers who said "Why use a minute and a half, it's not important, it's a low budget" and we find the budget is $7 million and they say it's a low budget.

Q You want to know what your bargaining position is?

A When we have given them a license and we have gotten some "Well, it'snot really decided who the star will be or how it will be used but, listen, don't give us too big a hassle on this because we don't have to use yours. As a matter of fact we are getting quotes on 25 different songs."

We don't want to be arrogant about it and we certainly don't want to be difficult

about it. We are reluctant to be suckers about it and we would very much like to know what is really happening and very often you can't get a straight answer from the producer because sometimes he is using his knowledge of what he wants to do as bargaining power over us that if he really told us just how they were going to do this thing the price would be much more substantial than the price they are talking about.

Very often when they come asking for a quote, from what I understand from some of the people at the Harry Fox office, the quote comes in, a request comes in with them doing the work for us with a suggestion as to what the quote should be, in case we don't get the idea.

In other words, they might call the Harry Fox office and say "We want to use a particular song and we don't want to go higher than X dollars," and we get that as a request to quote against.

Q You generally take that or you sometimes go over?

A I told you before if we have any

possibility of finding out what is really happening, a friend, a writer, an associate, someone connected with the company will make some effort to reasonably find out what they are talking about.

Q In terms of budget, who is going to perform it, how it's going to be performed?

A How it's going to be used, how important the film itself is.

Q How important the music is to the film?

A Yes. Is it a period piece. If you are doing a war story about troops based in England and you have a cabaret scene it's very nice to use our song "The Nightingale Sang in Barclay Square," but they could do something else that has no relationship to it.

But I would suggest that if I get a wind that this is a film called the "Longest Day" and Mr. Lord, who I think was the author of the book, in his book referred to "A Nightingale Sang In Barclay Square," and they are making a movie, the chances are they want to conform as close as possible to what was used in the book that carries more weight. I am giving you this

as a theoretical example.

Q It influences your bargaining position?

A Of course. I am not quoting a direct verbatim situation, I am inventing the situation so that you get the picture that I am trying to draw.

MR. BLUMSTEIN: We are past 4:30 and I would like to stop.

MR. HRUSKA: Since I cannot physically restrain you, Mr. Brettler being larger than myself, we will adjourn until tomorrow morning at 10 o'clock

(Time noted: 4:35 p.m.)

Joseph Quinones

***

* * *

issues dramatic rights with any frequency to television producers?

A No, not with any frequency.

Q It has happened?

A It's conceivable it might have happened. I can't think in the last ten years where it's happened.

Q Other publishers --

A Publishers of important Broadway shows, assuming that a television producer got the rights to do a Broadway show, he would certainly be involved in a grand right and it's quite conceivable that these grand rights are not licensed by ASCAP and would be licensed directly.

Q They are not licensed by ASCAP, I think that is clear.

A Yes.

Q Do you experience any difficulties in making contact or communicating with your writers?

A Well, it's a strange question. Writers change their domicile. They travel. I have experienced a lot of a number of difficulties where we have had to track someone down to get a permission

of one kind or another and the mails come back address unknown and the fellow has been in Mexico or is away.

In that sense dealing with so many hundreds upon hundreds of writers and one never knows what will come up tomorrow or today, I find trouble finding a fellow who I know lives in New York sometimes. Sometimes we want to get him in to revise a song, change a title, change a lyric, do something. There is always a problem in finding these people.

Q Is it fairly common for a writer when he is in the process of creating music to hole up, as it were --

A Like the Godfather said, hit the mattresses?

Q Something like that, turn off the phone or keep away from the phone.

A Every writer is so different and writers are such creative, colorful people that it's virtually impossible to give you a blanket characterization.

Sure, some go into a trance and when they work in the office you can't even walk down

the hall, it disturbs them. And others knock out a song in a half hour full of jokes. It's impossible for me to give you a blanket answer like that.

Q Suppose you were called out of the blue by a television producer and he said "I would like a performance right to song X and we are going to start filming the program or taping the program very quickly, I want to get your quick response to it."

Do you think you could negotiate a deal with him?

A I would tell him that I am surprised he is asking this question. He could save a lot of time by going ahead and use it and negotiate a synchronization right. He has the performance right.

Q Of ASCAP?

A Whoever he sells his program to, whatever broadcaster has it and there is no point in getting into it with us.

Q Let's make it an unreal assumption and say that there is no ASCAP license or BMI license for that particular use because, let's say, the

television station or the network is not licensed by ASCAP or BMI. You had to, if you were going to sell or license this performance right, you had to negotiate a deal with this producer.

A You asked me an unreal assumption and I would give you a real answer. Sure, we would then discuss -- if we could agree on a synchronization license and we agreed that we wanted to proceed with using this song and we had no objection to the way it was being used we would certainly negotiate. Some provision for performing fees in the unreal situation that is hard for me to conceive of, we would do this. There is no question of the fact that we would negotiate something.

Q Suppose you had to get the writer's consent, would that complicate it?

A It would certainly complicate it. And depending upon whether we could find the writer and get the consent, we would proceed. We would not proceed if we could not get the writer's consent.

Q Suppose you had to get the consent in writing?

A If he was in New York I would send a messenger up and get it signed, and if he was out of New York we would depend on the U. S. mails and it would hang up the producer for a couple of days.

Q Let's go back to the NMPA. I had mentioned before that we had just covered the surface of that and there were a few other things I wanted to ask you about it.

First of all, wasn't the original name of that organization the Music Publishers Protective Association?

A Yes.

Q When did that name change?

A Maybe five or six years ago.

Q That title kind of intrigued me. Can you tell me what the association was designed to

* * *

* * *

ing director of the association's day-to-day affairs.

Q Do you have any personal knowledge about the organization of the NMPA files?

A I have some knowledge of the organization of the files. I have seen them.

Q Could you tell me what you know how they are organized?

A I have never dipped into the files. I have never opened any of the files. I know the secretaries have file cabinets around the office, and I am answering a question that I don't know.

Q What is the address of the NMPA? Where are they located?

A 110 East 59th Street.

Q Have there been any discussions in NMPA regarding this lawsuit?

A Absolutely not.

Q Not a one?

A Not a one. I am talking, as I presume you are, that we are referring to conversations held at board meetings of NMPA.

Q Committee meetings?

A Or committee meetings.

Q Or in the halls?

A Or in the halls.

At board meetings that I have attended I can categorically state there have been no discussions that I recall of this particular lawsuit. At committee meetings that I have attended I can categorically state the same thing. In the halls and the men's room where I have been there have been no discussions about it. I can't say what happened with other members of the board in the hall and men's room and elevators. But without any levity involved here, I am sure I understand the meaning and intent of your question, and with all the sincerity and semantics I can muster, we are talking about a conversation about this lawsuit officially held during some bona fide NMPA function, activity, meeting?

Q Right.

A To the very gest of my recollection, there has never been a conversation about it and with total recall there has never been a really serious, involved discussion of it. That is, in my sense.

Q Have you ever participated in or been present at a conversation between publishers regarding

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

this lawsuit?

A Well, I have been present at the ASCAP board meeting where this lawsuit was discussed.

Q I will get to that later. I will get to ASCAP functions later.

A You are talking about private conversations?

Q Yes.

A Would you say the publishers consisting of a group of myself and more than two people?

Q Well, yourself and more than two people or one other person.

A I have discussed it from time to time with one other person, but I don't ever recall discussing it with more than one person or possibly two, and this may be riding in a cab or something after an ASCAP meeting where we were discussing it. But I have had -- perhaps I am anticipating what you mean -- but I have had no real serious, heart-to-heart, involved conversation with any publisher about this thing.

Q Is it possible for you to characterize the reactions of the publishers with whom you have discussed the lawsuit even in a casual way?

MR. BLUMSTEIN: I am going to object to that question. Certainly the form is improper.

Are you now talking about conversations after January 1, 1970?

MR. HRUSKA: Since the lawsuit was brought on December 31, 1969, by and large I mean except for any conversations that might have been held on December 31, 1969.

MR. BLUMSTEIN: That being the case, I will object to the question and instruct the witness not to answer for reasons I think I have made perfectly clear in the prior deposition sessions in connection with the Rule 34 objections.

MR. HRUSKA: Again, it is just going to require Mr. Brettler to come back when we get that objection overruled.

MR. BLUMSTEIN: If you get that objection overruled.

THE WITNESS: Can we go off the record for a minute?

MR. HRUSKA: Sure.

(Discussion off the record.)

MR. BLUMSTEIN: Mr. Hruska, after giving the matter some further consideration, I will

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

withdraw my objection to the question on the understanding, of course, that it is not a waiver of any similar objection in connection with any other similar question that has nothing to do with the Rule 34 objections.

MR. HRUSKA: We have that understanding.

MR. BLUMSTEIN: I am continuing to object to the form of the question, but go ahead and answer the question.

THE WITNESS: Could you repeat the question.

MR. HRUSKA: Yes.

Q Could you describe for us the reactions of the publishers with whom you have discussed this lawsuit?

A I think I said a minute or so ago that outside of the ASCAP board room and outside of some of the publishers on the ASCAP board, usually on the premises of ASCAP, I don't recall ever having a really serious, heart-to-heart, analytical conversation with any publisher or any of my colleagues or competitors in the publishing business about this lawsuit. Therefore, it is quite impossible to

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

characterize a reaction about something that never occurred.

Q You couldn't say that their reaction in general was negative to the idea of a per use license?

A I hope you are not asking to characterize my impressions of the feelings of the members on the ASCAP board who really are most involved on this thing as opposed to other publishers with whom I haven't spoken. Because I haven't spoken to other publishers about it.

Q We are segregating out for future delectation the ruminations of the ASCAP board. I want to focus now on conversations that you have had, even though perhaps in a casual way, with other publishers outside of a formal ASCAP function.

A I have to go back to what I have said rather repeatedly now, and insistently, that I haven't had these conversations. I might have mentioned that I can't go out to lunch with you on August 16th because I am involved on the CBS thing, and it's been conversations of that substance.

Q Have you had any conversations with

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

other publishers regarding the subject of use licenses?

MR. BLUMSTEIN: Give the witness an idea of what you mean by a use license.

Q A license to a group of musical compositic under which the licensee would pay a specific rate for each use.

A You are talking about have I had any conversations over what period of time? Throughout my career?

Q In the music publishing business.

A Yes, I have had conversations like that.

Q Can you remember any specifically?

A We have had conversations about the forms of mechanical licenses issued.

Q Limit this to small performance rights licenses.

A Small performance rights?

Q Yes.

A Small performance rights really don't come up as a frequent or infrequent subject of discussion because of the nature of the business of ASCAP and BMI licensing these things. The only time

that I have had some discussions with publishers about a use license was in a situation involving the 3M company on background licensing.

Q Let's hold that also.

What about discussions with publishers regarding the subject of direct licensing of small performance rights?

A Other than the situation that came up a number of years ago on 3M, I don't recall ever having a conversation with any publisher about that because it has not been an issue that has come up. That is, in my experience. And no one has come to me for any conversation, suggestions about it.

Q Have you had any discussions with other publishers regarding NBC's request for a limited repertoxy license?

A Outside of the ASCAP board?

Q Yes.

A No.

Q How about the Shenandoah proceeding?

A That is the --

Q That was the application by a group of television stations for a license which would exclude from their royalty base programing containing music

* * *

FEDERAL DISTRICT COURT REPORTERS
Copyrighted Materials

* * *

are some very significant publishing companies that don't use the services of the Harry Fox Atency.

Q Who? Didn't Warner Brothers just join up?

A Yes. I am talking about a company like Charing Cross Music, who is Simon and Garfunkel's publishing firm. I am speculating now, but Simon and Garfunkel get substantial royalties from your clients, CBS, and for whatever reasons they have they collect their mechanical income, to the best of my knowledge, either directly from CBS or through some other intermediary. And there are other companies such as that that don't collect through the Fox Agency.

Q They also license motion picture producers and television producers directly?

A If they don't have an agreement with the Harry Fox Agency to collect mechanicals, I don't think the Fox Agency would accommodate anybody in just one area such as synchronization licensing.

Q Any other significant publishers who do not use the Harry Fox Agency?

A The word "significant" throws me a little bit. I really believe that the Harry Fox Agency

represents most of the publishing firms in the United States in the collection of mechanicals and licensing and synchronization.

Q For many years Warner Brothers Music Publishing Company did not use Harry Fox in the licensing of synch and performance rights?

A That is correct. But they now do.

Q They started using Fox this year or last year?

A I think it was possibly two, three years ago.

Q Do you know why?

A No, I don't. But I might say that there were changes in the top administrative echelons of Warner Brothers in the last three or four years. Two or three people had been in there and the top man, each man thinks independently.

Q How do the negotiations transpire through the intermediary of the Harry Fox Agency for, say, the licensing of synch and performance rights for a motion picture?

A Usually because the agency is so convenient the producers, when they want to use a song and get a license, they call the Harry Fox Agency.

Q Marion Mingle?

A Or her assistant, someone in that department. They state what they want to use, how they want to use it, and ask if they would be kind enough to get a quotation. And sometimes there is some conversation about this to the effect, "Look, Marion, darling, it's a low-budget thing and we can't afford too much." And sometimes there are some suggestions as to what they think the publisher should quote, and sometimes it is very straight: "Get me a quotation." Very often it's "Get me a quotation on a list of five, eight songs, we don't know exactly what we want to use." And I think the implication there is the lowest bid will get the song. Sometimes it's a quotation on one specific use. It's all over the lot.

I am explaining a broad range of typical inquiries that come in to the best of my knowledge and understanding of what happens up there.

Q Is there a going price?

A More of a gone price because the price is getting so low.

Q I could understand how a publisher would feel that way.

A I don't think there is a going price.

Q Is there some sort of rule of thumb that Miss Mingle uses?

A The thumb of the producer in our eyes gouging us, that would be the rule.

Q Seriously though.

A I am serious. I don't think there is a rule of thumb. Is there a rule of thumb that every picture is absolutely identical, the budget is the same, the stars are the same?

Q A rule of thumb based on perhaps the budget of the picture, I mean.

A I honestly and sincerely can't put together a rule of thumb that the industry uses and I couldn't put a rule of thumb that I would use and my company would use on this.

Q Does Miss Mingle advise you when she calls you and tells you what she knows, that is, repeats to you the conversation she just had with this producer, does she advise you as to what she thinks your counteroffer ought to be?

A Well, you took me quite literally when I said they put a price on to get a quotation. Frankly, it doesn't always work that way, and it's

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

not always a counteroffer. To be quite candid, very often it's just an offer out of the blue sky that the producers want to get a feeling from the copyright owners as to what each one wants on a particular song. I know darn well that unless it's essential they use a particular song and they are out to get the lowest bid on a particular song and the lowest quote.

In my particular company the president, Richard Voltter, handles synchronization quotations more frequently than I do. I do it when he is not around. But if he is around we are departmentalized enough to know that that is his baby, so to speak. Sometimes we discuss it back and forth and sometimes we don't.

Have I drifted from the question that you asked?

Q No, I thought you were heading right up to it. Basically it is: Does Miss Mingle generally advise you as to what she thinks your offer or counteroffer should be?

A Let me answer it this way: Miss Mingle is not a robot and a pure computer-type functioning individual that says, "Look, I have an offer, give

me an answer, I have to get back to them.

If you prod her after discussing the uses, you say, "Refresh my memory, what have we done in the past?" she has a marvelous memory and it's easier to ask her 1000 firms have done in the past than going to the files. By God, she is right. She is remarkable in that respect.

I think that by and large she will keep strictly confidential our quotation vis-a-vis another publisher's quotation, and there is certainly going to be a conversation about the order of magnitude.

Quotations don't run in the hundreds of thousands of dollars, they run usually in the lower thousands of dollars, 2000, 5000, something like that.

Q In the hundreds?

A Sometimes in the hundreds, sure. Frequently in the hundreds, as a matter of fact.

She will pretty much repeat what her conversation has been with the producer, and sometimes give a suggestion and instinctive feeling. We, of course, very often say, "Thank you, Miss Mingle, we will get back to you and contact the

producer ourselves" --

Q And find out what the production is really about?

A Yes. And in negotiating this thing there are sometimes very difficult negotiations. We want to get just the right price where we don't price ourselves out but where we don't give the story away.

I hate to say this on the record such as this because it reveals a technique of our operating, but I know that sometimes I give a quote and the quote is couched in such language that I lead the person indirectly to believe that if it is going to reach a summarily no answer, that it might be possible to talk further about it. This is ordinary business, and some of this goes back and forth with Miss Mingle.

Q What I am getting at is this: Don't you look at some factor regarding this prospective use that perhaps is more significant in your mind than other factors in formulating your bid?

A Do I look at any one -- you are talking about myself personally?

Q Yes.

A There is no rule of thumb in our company. Mr. Voltter operates mentally different than I do. Our thought processes are never the same in this particular area, and my thought processes are going to be different from anybody elses. If you ask me how I would evaluate it --

Q Yes.

A I presume you are.

Q Right.

A One factor is who is the company and what are our relationships with them, and are we doing a substantial amount of business with them, and do they come to us and have we got a good relationship where they are going to think of some of our catalogs because they know we are going to treat them right because we do volume business with them. That is one consideration.

The prime consideration is the film, the type of use, what I consider the relative importance of the song, the sgars of the film, how important it really is for the producer to use our particular copyrighted work which is our property. And most of these songs come about after a very substantial investment year after year in running this company.

Q When you say the film as distinguished from the other factors you mentioned, do you mean by that the budget of the film, is it big budget or low budget, is this a $7 million or $2 million budget or $20 million budget?

A I think that certainly enters into it. We are going to be more inclined to charge more, let's say, if we had an opportunity to quote on Mutiny on the Bounty or Cleopatra, one of these things that 20 or 30 million dollars goes into production, that our contribution in our song would probably be more valuable in this massive production than somebody doing something of half a million dollars or a three-quarter-of-a-million-dollar budget.

Q We are talking about previously published music as distinguished from music which has been created for the film?

A I am, because our company hardly ever gets into submitting original songs. I think 99-9/10th per cent is not only pure but mathematically correct that we are talking about standards.

Q In your initial consideration of the bid and your initial discussion with Miss Engle does prices offered and accepted in the past on

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

relatively similar music come into play?

A Well, sir, I explained five or ten minutes ago --

Q I thought you had mentioned this.

A I know as an experienced music publisher we are not talking about quotations on the use of a film where you start talking about $100,000. The general range is a couple of hundred to five, ten, sometimes 20, possibly 50, if you own one song. I am now giving you a hypothetical case.

If I were friendly with Lerner and Lowe and they use one of my songs in My Fair Lady and someone wanted to do My Fair Lady, line on Broadway, and I had the one outside song, I might go very, very high because my bargaining position would be rather impregnable.

But, on the other hand, I might go very, very low when I get the feeling that someone is shopping around and they can use any one of 50 songs on a cabaret scene.

Q Take the run-of-the-mill type of transaction, forget about the extremes. Is one of your first considerations what has this kind of music

* * *

* * *

picture producer?

A We give them away all the time because we don't get enough money for it, what I consider enough money for it.

Q I mean for nothing.

A I don't recall us ever doing that. We have a lot of friends but no one we are that friendly with.

I would like to add that in this case we would go to the writer and get his consent and get it wrapped up, but that is theoretical.

Q Do you have any knowledge of the way your competitors operate in this field to say that they operate more or less the way you do?

A You have asked me in a prior question have I had conversations with other publishers about this, that and the other thing. I would like to clarify something. Most of my time is spent not with my competitors but with my users and my writers and so forth, and I really have very little communication with the other publishers. I don't think I have been to more than five or six in 15 years, publishing offices, and I don't think more than five or six publishers have been to my office.

I have a feeling that as far as the prices that I mentioned are concerned, that other people are doing it because if we were too far out of line we wouldn't get any business.

A producer would be much more qualified than I and Miss Mingle, who has a strong sense of integrity and won't discuss it with me or any other publisher, or anybody else, nor will Al Berman.

Q But do they take the same things into consideration that you describe?

A I think they would be foolish if they didn't, but I think we have some foolish people in this business.

* * *

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

* * *

some questionnaires going out.

I know that some analyses have been made, as I mentioned before, regarding copyright legislation, particularly with reference to the mechanical rate.

I have read from time to time in the trades although I can't pinpoint exactly what I am talking about, just as a general impression, that the music trade papers, Billboard, Cashbox, Record World, from time to time have run stories dealing with segments of the business, trends, and in the run of the mill articles that you find in the trade papers,interviews with executives of publishing and recording and broadcasting, somebody always seems to speak up with some statistics, that business is getting better or business is getting worse.

Q We were talking before lunch about the fact that there are no significant music publishers who are not a member of either ASCAP or BMI or SESAC.

How would you describe the benefits of ASCAP membership to a music publishing corproation?

MR. BLUMSTEIN: Is your question what are the benefits?

MR. HRUSKA: Yes.

Q What are the benefits of ASCAP membership to the music publishing corporations?

A The benefits are quite obviously quite substantial and I think that is as you attorneys say prima facie because everybody belongs to a performing rights society.

MR. BLUMSTEIN: Let me clarify something. Are you talking about membership or affiliation with a performing rights licensing organization or ASCAP as distinguished from BMI?

Q The question said ASCAP.

A The benefits of being a member of ASCAP?

MR. BLUMSTEIN: Yes.

A The benefits -- I am going to try to enumerate them one, two, three and so forth.

Number one, you have an efficient organization to negotiate and collect an important part of our income known as performing right fees.

It would be difficult for me to comprehend being in the music publishing business without having membership in ASCAP. I am

restricting my conversation now to ASCAP. It would be impossible -- and I choose the word carefully and advisedly -- for us to know about every use of our many thousands of songs without ASCAP. It would be impossible for us to set up an organization within our organization to do the logging, the policing, the tallying, to just inform us of where our material is being used.

ASCAP with its combined pooling of performing rights from so many different publishers and writers could generate an organization of sufficient size that could bring in sufficient money to provide the necessary facilities. I am talking now obviously of staff, office space, equipment, computers, to find out up and down the length and breadth of America where music is being used and this not only is broadcasting but this entails non-broadcasting uses, taverns, skating rinks, Yankee Stadium, sports arenas, all these places. Not necessarily in the order of priority here, but the main benefit is by membership of ASCAP we all collectively benefit because we find out through the activities of ASCAP where music is being used.

A We also, through our membership in the performing rights society known as ASCAP, have a way -- now we find where the music is being used. We now have an effective way to negotiate with the users, whereas in the absence of ASCAP it becomes an impossible situation for a publisher, the largest publisher, the largest groups of publishers, to set up any kind of an organization economically feasible to negotiate with all these users up and down and across America. By having membership in an organization such as ASCAP and the way ASCAP has evolved in modern times, we members of ASCAP pool a percentage of our income -- in effect we pool a percentage of our income that goes to overhead to enable us to have a legal staff of very competent, capable people, totally experienced in this field, to represent us collectively in these negotiations.

I would just dread thinking of the possibility that my company and every other company had to start individually developing a law staff and legal people, and training the top executives of my company and other companies in a very sophisticated body of law involving complex decisions,

in a very sophisticated evolution of negotiation, in a very sophisticated concept of the economic -- the true economic value of music to a skating rink, to a tavern in Des Moines, Iowa, to the CBS Network and ABC and so forth and so on.

It is of enormous benefit to all of us collectively, including my company, to have an ASCAP with this staff of knowledgeable people, not only in the legal department but in the index department. Indexing is very important. It is as important to us that somebody wants to publicly perform one of my company's songs for profit. It is possible they may have difficulty finding Shapiro, Bernstein. This may be someone in Chicago who may have a copy of our music of a song we published 20 years ago when we were located in a completely different area of New York City. They may spell the name wrong. But every user knows that you go to ASCAP, get a license from ASCAP and you have a vast repertory available to you, to the said user.

I know as a member of ASCAP that I am sharing in this very efficient system of contact between user and music supplier, so to speak.

My company functions five days a week. Our office hours are 9:30 to 5:30. It is very comforting and pleasant to know that anybody who wants to use one of my company's songs on Saturday or Sunday on a live broadcast of a news event or a football game can use my song even though my office is closed, and they don't have to call me Monday to ask if they could use something Sunday because we go around the clock by virtue of having ASCAP and the sun never sets on music publishing and the writing fraternity in America, as the sun never sets on the Japanese Empire, because any user at any time having an ASCAP license has our material available to them regardless of whether or not they can find us, regardless of whether or not we are open, or regardless of whether or not the chief operating executives of our company are there.

It is very comforting and very economically advantageous to us to have this facility because just on the fact that if we didn't have ASCAP, we operate one-third of each working day so two-thirds of each working day plus Saturdays and Sundays we are closed down, you can't communicate with us, and

now we are open 24 hours a day, seven days a week, on legal holidays and everything, to a user who wants any song in ASCAP.

I can think of some sideline benefits. I think I covered the main thrust of the major benefits.

I like to think of my company as being in toptop shape as far as our internal efficiency is concerned, but we do have card indexes and files and we do have people that really get their eyesight twisted and misfile a card. Sunny Side Of The Street may be filed on The Sunny Side Of The Street or on Sunny Side Of The Street, and some of the documents get lost, and it is nice to call ASCAP and say, "Hey" -- strike "Hey" -- say to them, "Can you tell us if we own a particular song? Because we can't find any record in our index file."

ASCAP not only provides a service to the user in maintaining a very professional indexing system of American music, which I understand ASCAP also indexes songs controlled by BMI and SESAC, it has the most extensive files of information about the copyrighted songs probably available in the world,

except for the Copyright Office. The ASCAP files are even more useful than the Copyright Office because it shows a lot of other things: participating publishers, royalties, percentages and so forth.

While I have been talking about the fact that the index files are useful to the user, they are useful to the companies. My company is not the only one where we have to call and ask them anything. It's nice where we have a duplicate system.

In New York City, in the last couple of years, we have had fires, bombings, explosions. You think you are in a safe building and so forth, and I have given serious concern as to what would happen to Shapiro, Bernstein if one of these catastrophes happened in our building, and I am reconciled that, please God, we get our employees out, and if the files go we really are not out of business. We go to ASCAP and they tell us what we own. We then go back to the Copyright Office and get our copyright certificates and most of our important documents have been recorded. It is expensive but we are not out of business

because of a catastrophe.

I am getting down to more or less abstract considerations here. I certainly would not put in the same league, in the same magnitude, even in the same room, questions of the efficiency and economy of negotiating with the user compared to the fact that we have a duplicate Shapiro index in ASCAP. We can always pull it out. There is just no comparison in the order of importance. But you seem to think of asking me everything, Mr. Hruska, and I am just trying to answer everything off the top of my head again.

Q This is very helpful.

Can you think of anything else?

A I mentioned that there was a great advantage in the pooling of interests in being able to get top-flight legal counsel to represent us in this bewildering area of law to us as laymen, and to many lawyers, in fact, and in this bewildering area of rates and negotiations and economic justification. And it almost implied that that means the legal department of ASCAP; possibly you might interpret it as meaning Herman Finkelstein and company, and to a great extent it

does.

I have nothing but enormous respect for Mr. Finkelstein, and yet Mr. Finkelstein operates the legal department of ASCAP with the help of outside counsel. It is well known that outside counsel, some of the most prominent and capable law firms in the country, if not in the world, have represented directly ASCAP in very difficult negotiations, and we as members benefit from that association in ASCAP. And I think it is quite obvious that the gentleman who is restraining me from volunteering too much information, Mr. Blumstein, is not an ASCAP employee but comes from a very well-known firm, which in the interest of time I won't repeat the name, and I feel very fortunate to have Mr. Blumstein here because I would be completely at the mercy of Cravath, Swaine & Moore, known as the tigers of the Wall Street area, without him.

MR. BLUMSTEIN: Now would you like to answer the question?

A Can I think of any more benefits?

Q Yes.

A You are not allowed to quote that in any of your -- your public relations department is not

sllowed to quote that. I retain author's rights on that.

I probably could think of some more benefits but, as I recall, I am pretty sure that I hit the highlights of this thing in my previous answer and substantially I indicated what I think the main benefits of my company and everybody else belonging to ASCAP are.

Q What do you think would happen to Shapiro, Bernstein as a company if its board of directors persisted for some odd reason in not being members of ASCAP or, for that matter, BMI or SESAC?

A Could you tell me, would they just leave the company suspended in midair and not be a member of any performing rights society, are you asking what I think would happen?

Q Yes.

A I think the stockholders might be very upset with the board of directors unless they provided some way that we could negotiate and collect performing fees that at least were substantially equivalent to what we are doing today. If the board of directors made the particular decision

you defined, resigned from all performing rights societies and left the company suspended without providing an alternative method of collecting performing fees, I think it would cause considerable internal dissent among the stockholders of my company who elect the board of directors.

Q Let's say the board of directors just said, "From this moment on we are terminating our memberships in performing rights societies, organizations, and we leave the management to take whatever recourse is at their disposal to keep the company alive." Do you think the company would survive?

A You ask me a very hypothetical question.

Q Of course.

A I would have to say, considering your question and considering the fact that you did say that they took other appropriate steps and measures --

Q The board said to the management, "You, management, take all appropriate steps and measures, other than belonging to ASCAP, BMI or SESAC, to keep this company alive."

A I have petty friendly relationships

with my board of directors, and if they gave me that assignment I think we would have quite a prolonged conversation about it, to begin with, and I would say, "When you starr giving me tasks like that would you please give me guidance and instructions as to what we do and where we go."

Considering that I just went through a long, involved explanation of what I thought the benefits of membership in ASCAP were and they would hypothetically say, "Okay, you, the management team, come up with a way of finding out who is using our songs; you, the management team, come up with a way of finding out how they can contact us 24 hours a day, around the clock; you, the management team, find out how to go about negotiating with these users; you, the management team, come up independently and start finding out what the economic value of your copyright in Yankee Stadium is and Madison Square Garden and NBC and ABC."

Did I leave out anybody?

You ask such a hypothetical question that it is really ludicrous for me to try to answer in the sense that this is a real conversation and a real problem. It's a real conversation but it's

not a real problem until it happens.

Q I understand that and I understand that the hypothetical is absurd. But given that hypothetical, do you think Shapiro, Bernstein could survive as a corporate entity, as a business?

A In quid pro quo, if a hypothetical question is absurd, probably the answer is absurd.

Q What is the answer?

A Well, if the answer is absurd why don't we just leave it as an absurd answer. I can't answer, considering that I am under oath here, what I really think about such an absolutely bizarre, hypothetical question. I think I have indicated the answer that I really don't know what I would do if I were given a mission by my board of directors to set up within my own organization, with considerably less, limited financial resources than ASCAP has, the equivalent of an organization that can do for my company what ASCAP is already doing. I don't see how now I could possibly do it, and therefore I don't see how now, under oath, I can possibly answer this hypothetical question.

Q I think you just have. You don't see how you could possibly do it, is that the point?

In other words, you don't believe that the company could survive?

A I said that and I say it now and I indicated the reasons for it.

Q It is because of the reasons you gave that I asked the question that I did. I thought in effect that is what you were saying.

A Let me modify even that.

Yes, I can see how the company can survive, because I think my company can survive as an enterprise if we didn't receive any performing fees at all and we changed the nature and structure of the business, if you want to really split hairs about what survival means.

It would be a great economic loss to us financially if we didn't find a way to collect our performing fees.

Q This is really quitting ASCAP and any other performance rights organization. This is really an unthinkable alternative for a responsible music publishing company?

A It certainly is to me. to my way of thinking.

Q Would you like to add something?

* * *

* * *

Q Let me ask you, Mr. Brettler, what your rule-of-thumb figure is on ASCAP distributions in respect of a CBS Television Network feature use?

MR. BLUMSTEIN: What does that question mean? Do you mean how much is a feature performance worth?

MR. HRUSKA: How much is a feature performance on the CBS television network worth to you?

MR. BLUMSTEIN: I will make the same objection and give the witness the same instruction.

Q Let's suppose ASCAP went out of the business of licensing performance rights to television networks, what changes in that business would occur?

MR. BLUMSTEIN: ASCAP goes out of the business?

MR. HRUSKA: Of licensing television networks. It remains in the position of performing all other functions it now performs. The one thing it does not do is license television networks.

MR. BLUMSTEIN: What changes would take

place in the business of licensing performance rights to television networks?

MR. HRUSKA: Yes.

MR. BLUMSTEIN: I will object to the form of the question, but answer it or do the best you can.

A I am not trying to play amateur lawyer but I want to object again, if not theform of the question, to the question itself. To my way of thinking, it is another excursion into fantasia that has no reality. I can't see ASCAP going out of the business of licensing television networks because ASCAP is in the business of licensing television networks and it is a vital and important part of their business.

You throw this question at me which I have never thought about and expect to get an answer off the top of my head, which I think is unfair to expect me to do that. So I will answer it by saying that I think the jolt to the industry, to my company, would be substantial. I think we would have a whirl of problems. I don't know what the ultimate effect would be. I don't know what the resolution of it would be. I don't know

what alternatives would be available to us and I don't know how we would respond to the various options and alternatives that would be available. And with all these uncertainties in the picture leading up to my answer, I really must say intellectualy, I just don't know.

Q Do you think that there would be a good deal of price cutting by publishers in the licensing of performance rights to television networks?

MR. BLUMSTEIN: Objection as to the form.

A In this case I haven't got the slightest hesitation of saying not that I know, but I am virtually positive there would be a deluge of price cutting bordering on the cutthroat nature that would lead to mutual self-annihilation.

You look surprised at that answer.

MR. BLUMSTEIN: When he says mutual he doesn't mean CBS.

A I mean among us competitors who would be so desperate and jockeying for position, none of us having any strength, dealing with one huge user or an industry that is a huge user, consisting of three

main entities and we only have those three doors open to us and all 4000 of us converging through that door, I think there would be tremendous amounts of concessions and price cuttings and deals.

When people are desperate usually desperate measures are taken for survival, and this would be a case of survival and survival of the fittest becomes jungle terminology that originated with Darwin's study of the animals.

Q Do you think all music publishing companies or a substantial part of them would go out of business if television networks stopped using publishers entirely?

A I think some music publishers are very deeply involved in background music and television music, and more so in that respect than they are in pop songs, and I think a slew of them would be in terrible shape if this happened.

Q How about publishers with broad lines of music catalogs?

A Well, if a publisher is agile enough to cut his staff to the bone and cut his overhead to the bone and move to the boondocks and cut his rent to the bone, he might be able to survive. But this

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

word "survive" has all specters of meaning, and survive might mean a bare subsistence survival without making any profits or substantial profits.

Q Are you taking into consideration in your answers the facts that publishers would go on licensing through ASCAP all other users of music, all television stations, all local programing, all radio stations, radio networks, all other users in the country?

A I realize that you raised that question when we are talking about deleting television networks. Mr. Hruska, I am sure you are aware that under the ASCAP distribution formula there is a concept known as follow the dollar that emerged from the recent or last consent decree. Certainly either ABC -- and I don't mean the network, I mean the simplicity of understanding that a network performance going out over two, three hundred stations is considerably more important because the statistics I have seen of the Nielsen ratings, 35, 30 million people in America might be watching a network program, whereas considerably less, maybe a few hundred thousand may be watching a local station.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

The fees paid on network television to ASCAP by the networks are considerably more than the local television fees, and a performance on network television and the follow the dollar concept comes out of the computers and onto the statements showing a much higher credit, which converted into dollars is a much higher earning than a -- performance on local television.

Q What percentage of the Shapiro Bernstein gross income is attributable to royalties from television network use of Shapiro Bernstein music?

MR. BLUMSTEIN: Mr. Brettler, I am going to object to that question and instruct you not to answer.

(Recess)

Q We were dealing before the break with the proposition that ASCAP was enjoined of licensing performance rights to television networks and that this business was thrown up for grabs. I was a little unclear at something you said concerning the effect on publishers, music publishers, in the industry.

You mentioned the fact that there were some publishing concerns that specialized in background music and you thought the impact on them would be substantial.

Could you describe what you would foresee as the impact on other types of publishing companies?

A I think we also were discussing the relative importance of a television network shot

to 20 million viewers as against local television. I think we considered television performances as very important for the financial fees we receive in terms of the licensing the public performing rights.

We consider it important in terms of exposure, people hear a song, 30 million people hear it, some of them may go out and buy the record, the whole thing is locked in together. The point I am getting at is that if ASCAP didn't license -- you raise the question that for some reason ASCAP weren't licensing television networks and some other option would have to be available to the ASCAP publishers, I suggested that there would be a wild scramble that would lead to -- I think I used the word self annihilation, in my opinion.

Q That is the part of your answer I suppose that really shocked me. I don't understand that. Do you see any publishers going out of business because of that?

A I don't know what the profit and loss statements are for the 14,000 publishing firms and the 4000 or 5000 ASCAP publishing firms. I know

perfectly well that there is a large organization or organizations belonging to publicly held companies which recently divulge their financial statements but I also know that a lot of publishing enterprises are privately held organizations, small organizations, one, two, three, four people.

Q That operate marginally?

A If not marginally quite successfully. I would not be at all surprised if the tax laws being what they are in this country that much of the income of these companies is spent for the benefit of the employees and stockholders and not too much is left for corporate taxes and thrown into surplus and these companies all come under the personal holding corporation laws and even if they were old and established and had -- personal holdings wipe them out and these people will take it out of salaries and they begin to live according to the income generated by their business which may not gross 5 or 10 per cent a year and all of a sudden this terrible problem is thrust upon them that they have to go out and license directly or in some way other than through ASCAP and all these 4000 ASCAP publishers were converging

SOUTHERN DISTRICT COURT REPORTERS

on the networks trying to get some deal, trying to get some payment from them.

I think there would be a number of really desperate people that might go out of business. There would be hungry people that would hate to see the lost. Some timid men might hate to go back to their wives and say dear wife, we can't afford this nice home we are living in and so forth.

I really won't change my opinion because you asked me this question. I think that it would have substantial impact across the board, even to the big companies, one or two of the big companies who are owned by other companies. The big companies throw off a lot of money from the music publishing operations developed over the years and there have been years when a particular motion picture company ran at a loss and its most profitable and only profitable division was music publishing and in a year where they have great profits I don't think this would be of tremendous concern but if this were in a year where the parent company ran at a loss and they took a beating, a financial beating on their television performances

because they too were involved in this scramble of David versus Goliath, the largest music publisher is still David compared to the Goliath of the television industry. The so-called top ten are still Davids compared to Goliath and the only time that I have ever heard of David whipping Goliath was in the bible. Usually Goliath swamps David.

Q You said something about publishers converging on the television networks. Do you think that would happen?

A Well, it all depends on how and why this hypothetical condition existed that ASCAP suddenly stopped licensing. I think you said suddenly stopped licensing and that would mean that it would come as a surprising impact to the industry and I think for that reason particularly there would be a convergence which means a mad rush to protect, every publisher protecting his own stake and interest.

Q Would they converge on television producers as well?

A Well, they would converge I think on the broadcasters because the broadcasters are the

ones that publicly perform for profit and are the ones, from my understanding of the copyright law and certainly the way ASCAP and the broadcasters treat each other relative to this law, the broadcasters being responsible for paying the fees for their public performances for profits, I certainly think this hoarde of desperate small,medium and large size publishers are going to converge on the television networks.

Q What about the producers then?

A Well, we are converging the producers now to try to get them to use our music. We wouldn't converge to them to get payment. We go to them for synchronization payments.

Q Suppose the networks turn the job of licensing music, buying music in effect, obtaining performance rights to the producers of television programs --

A So the hoardes of descending publishers or the hoardes of desperate publishers would logically then descend on the producers who would be in a rather strange bargaining position because I think some of these producers now consider themselves David compared to the Goliath of the

television networks and all ofa sudden they become a small Goliath still compared to our publishers. Right now we only have three networks to go to. There might be, for the sake of argument, 100 producers to go to but that is still a pretty small door considering the flood of music.

It would be very nice if CBS -- it would be very nice, let's say, that there weren't three television networks, there were ten or twenty television networks or 100 or 1000 small television networks and if we couldn't make a deal with CBS in New York we could go to 15 other companies in New York or work in Boston or Des Moines or Miami and if you are not successful there you would be successful somewhere else as we are with record companies.

If one record company turns down a record we have one, two, one thousand -- not a thousand but a tremendous number of avenues to turn to. If we are rejected by CBS, NBC or ABC for any reason, including blacklisting because we are uncooperative on rates -- this has been known to happen in other industries.

Q Would you have to hire additional

staff to solicit television networks and/or producers?

A To solicit them for performance rights licenses?

Q Yes.

A I certainly would.

Q You couldn't do this with your existing staff?

A I certainly couldn't. I couldn't even do it with our existing legal staff.

Q What is the problem that you see in this? Is it more the duplicative cost of all these publishers licensing on their own or is it the prices that you think would eventuate in this sort of market? Is it a fact that the prices going down or is it a fact that the administrative costs of licensing are going up or is it both?

MR. BLUMSTEIN: I am going to object to the form.

A My attorney is objecting to the form. I can only answer that -- I must say thank you for the two answers you gave that I would give. I think they are both germane. The price competition would quite obviously be driving the price down. All the

user has to do is stand there and not even try to bargain the price down. We hungry publishers among ourselves will slit each other's throats and voluntarily drive the price down. We do it with record companies. Certainly the administrative costs would go up. You have a declining income because of the competition and an increasing overhead. It certainly points to a direction of financial problems, if not disaster.

Q Here is a need. Suppose the need is filled by the creation of any number of Harry Fox type operations. Let's say ten Harry Fox operations, would that help?

MR. BLUMSTEIN: Ten Harry Fox type operations --

MR. HRUSKA: We have ten Marion Mingles who act as intermediaries between television networks and producers on the one hand and music publishers and writers on the other hand.

A Well, Mr. Hruska, actually it might hinder. We have been through this question of ASCAP and BMI and the two choices and sometimes it's quite difficult for someone new entering music publishing to decide whether he should go to

ASCAP or whether he should go to BMI, which society will negotiate better for him. Which society in the long run will earn more income for him. Then you have to make a choice between one and two. YOu are suggesting that we compound this thing by having ten ASCAPs, BMIs or negotiating or licensing bodies where you have to elevate the competence of the organization, the efficiency of the organization.

I assume you would have to make some kind of a long-term deal with one of these ten. It would seem to me that it would be a more complicating factor and a bigger hinderance.

Q Suppose the whole thing were given to Harry Fox to do? In other words, Harry Fox was now designated by the music publishers as an agency which would operate in the same fashion with respect to the licensing of performance rights for television network use as it now operates in connection with the licensing of performance and synch rights for theatrical motion picture use.

A Wearing my other hat as a director of NMPA with said board and with having to pass on something like this, I would have to say "Thank

KATHRYN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

you very much, the Harry Fox Agency has all it can do in its present structure and form to negotiate and handle mechanical licensing"-- I don't mean -- I mean handle mechanical licensing --

Q They really act as brokers?

A As intermediaries following instructions of the publishers but they do more than that because they also conduct a policing operation on unlicensed works and they are responsible for an auditing operation.

Q The music publishing industry created the Harry Fox agency. Why wouldn't the music publishing industry create a similar agency to handle the licensing of performance rights for network television use in the event that ASCAP and BMI were enjoined from performing that function?

A Well, sir, I would like to suggest that the music publishing business also originated ASCAP. I would like to suggest that ASCAP was formed in 1914 with a relatively handful of music publishers and writers and the concept of an agent and trustee began around 1920, again with a handful of relatively speaking music publishers.

I wouldn't want the job of lining

this up and trying to get the 4000 ASCAP publishers to form or to come with me in the Leon Brettler agency because I was going to do this as an individual or form a corporation to do it.

Q Why not? There would be a lot of money to be made.

A There would be a lot of money to be made -- there would? Then I don't want to join my organization because if Leon Brettler is making all thatmoney he is taking it from me.

Q Doesn't Fox charge a fee?

A Three and one-quarter percent.

Q Isn't that a good deal of money?

A The lowest commission in the whole world, the European society collecting mechanicals get 15, 18 per cent. It's a remarkably low commission. The commission was three and a half per cent a year or so ago. The board of the agency recognized that enough money was coming in from commissions to more than adequately cover the overhead and set up some reserves so we cut the commission rate.

Q It's a non-profit organization?

A Definitely. I think the example I gave

you just showed it. You are talking about setting up some other agency, would it be a personally owned, private enterprise? I may make a lot of money and my friends in the business would know I would be making a lot of money and maybe out of envy and pique they wouldn't go with me. Even if they would it takes a lot of salesmanship.

Mr. Berman who runs the Harry Fox agency spends considerable amounts of time with new people on the music publishing scene, explaining how it works and so forth. I just have every instinct that it would be a colossal and massive job trying to organize another independent -- I don't mean independent, another intermediary agency to function and to organize, as you said, ten, fifteen would be even more cumbersome and confusing.

As a practical matter considering that we are now in 1972 and not in 1920, we are now dealing with 4000 ASCAP -- I think you said 5000 the other day, publishing entities spread all across the country not focused in New York and Los Angeles where you could do it by taxicab and New York and take a trip to California, you have to go all over the country.

Publishers are going to be very concerned. You go back to their counsel, their Ouija boards or clairvoyants, however they do it, I think you are throwing me a question that I can only answer by saying that it comes under the realm of complete and utter chaos, the way I see it now.

I hope I have answered your question. I have tried to answer it to the best of my ability.

Q Let's get back to the price side of this. You were testifying about before ranges of prices in the licensing of performance and synch rights to motion picture producers and you talked about a range of several hundred dollars to several thousand or more.

Suppose you were contacted by a television producer who wanted to use one of your big standard songs in a nightclub scene, what kind of range or prices would you be talking about in that situation?

MR. BLUMSTEIN: What is he getting, synch rights and performing rights?

MR. HRUSKA: Yes, same thing as the motion picture field.

A Again I want to point out that you ask this question like you are very innocent, butter wouldn't melt in your mouth, as if we are talking about this same type of situation and I want to refresh, for the record, when we are talking about synchronization rights, we are talking about something that has been in existence for a long time, that I have a body of experience, real experience in it, an instinctive feeling for the value of some of these things, some feeling of confidence because we have been doing this successfully for a while that the prices were quoted and the prices were getting are in line of what other people are doing.

Without consulting the other people I know that for better or worse the industry has evolved for this price structure and it was a wild price structure considering the several hundred dollars I gave as the low extreme and the $10,000 I gave as the high extreme. That is a pretty broad range but it's something that I have had experience with and I have lived with.

Now you are asking me out of the blue what would I do about television producers where up to

now ASCAP has been handling this for me. The staff of ASCAP know a heck of a lot more about it than I do even as a long-term director of ASCAP, the economics involved in this thing. They have statistics. They know the income of the producers and the networks and all the things that I would have to educate myself about.

So my answer to you is, sir, I could not quote you a price now at this interrogation and if this were a real case I would say I can't quote you a price now, I have to do some real research, analysis and some very heavy research and analysis because I have a lot at stake on this thing.

If I go haywire in quoting motion picture producers, well, there aren't that many but if I start going haywire in quoting television producers there are more uses today for television than there are in the $5 million budget films. Television is a medium that just consumes talent and films and shows. It's going around the clock 24 hours a day. I would want to be much more careful about how I would treat that problem.

Q Let's start from one extreme. Would you give that television producer in my hypothetical

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

example the music for nothing? Would you let him use it relatively free?

A If he was my brother. And my writer agreed and I liked my brother.

Q Let's suppose he is not your brother and he is a guy you don't know. He just calls you up and he says "I am producing this television program, I want your music for nothing."

A It's not so hypothetical because we get requests like that now, I am producing a show, can I get it for nothing because you will get the performing fees.

Q Here you are not going to get performing fees from ASCAP because ASCAP is not doing the licensing.

A And he says can I get it for nothing, no synchronization, no performing fee?

Q That is right, I want you to give me a performance right and a synch right license and I don't want to pay for it.

A Are you trying to lead me to say point blank I would say no because if you are, you are correct, I would say no.

Q I said that was a ridiculous extreme.

A But my answer was not.

Q Before the change of the tape you were telling us that you would not give your music away for nothing. Would you take into consideration the amount of distributions that you had been receiving from ASCAP in respect of a use of this nature?

A Yes, of course I would take it into consideration and I would like to say that I don't think we are getting any particular bonanza from ASCAP, none of us publishers and writers are, because I think -- I am not trying to propagandize the ASCAP cause here and if you wish to get into it with me privately or on the record, I think music is sold by ASCAP to the networks to all users at very, very low prices.

I, as a publisher, as a board member, individually and in whatever official capacity I have, really sincerely feel that the purchase of music by the users in this country, including the record companies at the two-cent rate, is a tremendous bargain.

Q So you would try to get more than the ASCAP rate from this producer who called you?

A Yes, because in my function on the ASCAP board I am leaning pretty heavy on the legal department and in all these negotiations the word I like to say is more and not less. I think it's a justifiable cause I am advocating and not just a matter of a greed and take what you can get. I think there has to be some rationale on these things.

Q In this hypothetical example do you think it realistic that you might obtain more for this use?

A In this hypothetical example I think it's quite realistic that I am going to obtain substantially less for this use.

Q Why?

A In unity there is strength and in disunity there is weakness. The unity of ASCAP which is basically a legal monopoly, we have more strength in combining this negotiattion, throwing all our copyrights together into a vast pool of music that makes it very attractive to a user to deal with ASCAP. We don't have to face the problem of all of us individually dealing with a user or a producer in the hypothetical case we are talking about now.

That user can really exert a hell of a lot of leverage on us by saying listen, my friend, I don't need your song and in most cases, in many cases, he is quite correct that he can use somebody else's song and let me see what you will undercut your competitor with.

Q Let's go back to 1964.

Do you remember being approached by somebody from the Minnesota Mining & Manufacturing Company which we will call 3M with respect to the possibility of licensing 3M to use Shapiro Bernstein music on 3M tape cartridges and tape players?

A For background music?

Q Yes.

A Yes, I do recall that.

Q Who approached you from 3M?

A I got a call from the attorney representing 3M. His name is Allen Arrow. He said "Leon, I would like to come over and see you, I think I have an interesting idea."

I told him to come on over and he came over with an employee from 3M, a gentleman by the name of Ray Lindgren, and for the first time sitting in my office Mr. Voltter I recall was present and

the four of us for the first time I heard about the plans 3M had to go into this business.

Q Did they tell you that they had been talking to the other publishers at thattime?

A I don't recall if he told me they had been talking or they were going to but the gist of the conversation was that they had made up their minds that they wanted to talk to publishers about making direct deals with them.

Q By this point the negotiations between 3M and ASCAP had broken down, had they?

A At this point --

MR. BLUMSTEIN: Can we limit that question to not the fact of whether negotiations were broken down but what Mr. Brettler was told either by people at 3M or people at ASCAP.

MR. HRUSKA: I will make it clearer. Obviously a lot of this has been set forth in depositions in this case but let's see if we can agree to a brief chronological summary here so as to save a lot of questioning.

In 1964 negotiations were conducted between 3M and ASCAP in which 3M was attempting to obtain from ASCAP a license for the use of ASCAP

mucis in connection with these tape cartridges and players.

MR. BLUMSTEIN: Let's identify the series. It was the 700 series?

MR. HRUSKA: Yes, the 700 series. It was the first series and I think there were three in all, as I recall it.

At some point in 1964 those negotiations broke down in the sense that ASCAP and 3M stopped negotiating. The last offer by either one of them had been turned down.

MR. BLUMSTEIN: I think we have a little problem. There were negotiations and there came a point in time when the negotiations stopped and 3M rather than negotiating with ASCAP began to contact publisher members of ASCAP, how is that?

MR. HRUSKA: For the purpose of these questions, fine.

MR. BLUMSTEIN: I think that is sufficient.

Q You were aware, I take it, Mr. Brettler, as a member of the ASCAP board that there had been negotiations between 3M and ASCAP prior to the

approach made to you for direct license by Messrs. Arrow and Lindgren?

A I think if you read back what I just said, I said that for the first time I heard about the balance of 3M to go into the background music business when Mr. Arrow came over to my office and we had many years prior to that had friendly and cordial relations.

Q In other words, the negotiations between 3M and ASCAP had not come to the attention of the ASCAP board of directors prior to the time that Messrs Arrow and Lindgren approached you?

A Well, I can only answer that by saying that I think my attendance record at ASCAP is pretty consistent. I remember I had an operation in 1964 and I missed a couple of meetings. I can only say that it came as news to me because I had never been to an ASCAP meeting or heard from anybody that 3M was going into this business and I was or I am quite sure in my mind now that -- because I have pretty good recall on this thing -- that that was the first time I heard about it and I even kidded Allen Arrow. I said as friends often do "You blankety blankety blank, thanks for

pulling this on us, why didn't you tell us about this." I had a more informal working arrangement with Allen than I might have with someone who I just met or if Miss Mingle had comein cold I think it would have been much different. I feltthis was -- as they say down south "family" because we have been good friends socially and otherwise for a number of years.

Q Do you remember that this meeting took place on October 29, 1964?

A That great a memory I don't have.

MR. BLUMSTEIN: Mr. Arrow so testified.

MR. HRUSKA: Yes, Mr. ARrow testified to that effect.

THE WITNESS: Mr. Arrow can't even remember where he is supposed to meet me.

MR. BLUMSTEIN: Mr. Arrow so testified with reference to a diary he kept.

THE WITNESS: Then I will not slander Mr. Arrow any further regarding his memory.

Q Could you net out this meeting, what was the sum and substance of it? They told you about the project and you were interested, is that about it?

A If you say so.

Q I don't know. I am asking you.

A I was more interested. I was impressed.

Q Did you ask Arrow whether he had negotiated with ASCAP?

A Yes, Allen told me that they had been negotiating with ASCAP and he had been running into problems. I asked him what the nature of the problems were. I had a conversation with him about that. I said that it all comes as news to me. I felt, quite honestly, irritated about it. I was irritated at Allen that he hadn't mentioned it to me. I found out these negotiations were going on seven or eight months and Allen said, and correctly so, and I admire him for it, he has never used his friendship with me or anybody else on the board to try to influence one of his projects through bacause he has many clients in the music business, nor has he divulged something that is coming up of a confidential nature until the time comes to tell everybody.

He said, "I have Mr. Lindgren, we are going to make a sweep around New York and see what we can do about getting publishers involved

directly."

Q Did he say that you were the first publisher he had contacted?

A I honestly don't remember. If I wasn't the first, I was one of the first.

Q What did he tell you was the problem in the 3M-ASCAP negotiations?

MR. BLUMSTEIN: I will object to the form.

A You are asking me about details of a conversation that took place six, seven, eight years ago and two months in October. I don't think I have accurate total recall in this, but I am going to try to answer this as best I can recollect it.

My recollection of it is that the people he was negotiating with at ASCAP, and this is the legal department of ASCAP, which logically would be the first one to receive communications on the problem of this matter, seemed stymied by the newness of the idea. The newness of the idea involved the fact that 3M planned to sell the tapes to a user which incorporated a performing grant for a three-year period of time.

There was a big problem in the minds of ASCAP about what happens after the three years, how do you police it. There was another big problem that the consent decree requires ASCAP to quote comparable licenses for comparable uses and there were no directly comparable uses.

There were some reasonably comparative uses, other background services, the wire services, the Muzaks, they were struggling with some form of analysis to figure out how you can compare a fee for the sale of these tapes with the percentage fee that they were getting from other background users.

There were some delays that Allen Arrow characterized as unduly long between letters.

Q How about the blanket aspect of the license that ASCAP wanted to issue?

MR. BLUMSTEIN: Could you clarify that? What do you mean by blanket aspect?

MR. HRUSKA: I gather 3M was interested in a license to specific compositions and ASCAP was interested in a license to the entire repertory.

MR. BLUMSTEIN: That is what you gather. I don't know whether it's accurate or not.

Q Was that part of the problem?

A I don't know whether it's accurate or not but my understanding of the way ASCAP can license under the consent decree is that ASCAP can't deal on specific songs. It can only deal in bulk and has to offer in a situation like this an arrangement where the user can come in and select from the entire ASCAP repertory what he wants to use.

Q Unless the member in interest consents?

A Yes, a technicality that --

Q A technicality that what -- that is not realistic?

A That is realistic. It's a technicality that I didn't get into that I only vaguely remember. Thank you. If I wave my hand it's because I am trying to focus into my recollection of this thing.

I also recollect that the early stages of this thing, 3M at that point had no production line to make the recorders, had no master tapes. They were just lining up their patents and concepts about going into this thing and really had to know what the cost of music would be so that they could get on with their market research and

evolve the total cost of the tapes and units and figure out before they made an expenditure of millions of dollars to go into production what their costs were going to be so they could figure out what their profits and gross sales would be and do whatever 3M does by way of market research. So I understood quickly that it was of great importance to 3M to get some sort of quotation from somebody on the use of music.

Q After this conversation with Arrow --

A Let me finish.

Q I am sorry.

A In those early days when Arrow and Lindgren were talking to ASCAP 3M -- I think you said before 3M wanted to use 700 specific songs. I am not sure you are correct on that. I think they knew they wanted to have a tape that would contain 700 songs but I am reasonably certain that at that point no one really got into what songs they would use, what the sequence would be. They just knew they had a design of a cartridge that would carry 700 songs and they were going to ask ASCAP to have the repertory available under some contractual arrangement.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

Q After your first conversation with Arrow and Lindgren did you have any conversations with any other music publishers regarding the possibility of those publishers granting licenses to 3M?

A I told Mr. Arrow that I found this very interesting and I hoped that in one way or another my company was going to get into this project and the first thing I wanted to do was check with ASCAP. Allen said "What do you think about this" and I said "Well, I can't make a commitment now, I really want to find out what is really happening here."

And I did check with ASCAP I think that very day and received the explanation that I just gave you as to what the problems were and why it was hanging in mid-air and I responded by saying "Listen, I don't think this thing should hang in mid-air because this is an experimental use. We are hanging up a big company."

Being on the public relations committee I didn't think it was good for ASCAP to get into these hassles. I didn't think it was earth shaking, it's background music,it's experimental.

I think we owe it to 3M to get cracking on this.

I heard the counterargument "Leon, we don't think it's that simple. The consent decree, this, that, we have to be careful and that rate that they are offering of one cent a year for three years or three-cent performances seems quite low and unacceptable to us," and so forth, and we went back and forth.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

330

Q What publishers did you talk to?

A That was my first recollection of what I did.

Q The ASCAP conversations?

A Right.

Q Who was it at ASCAP that you discussed this with?

A Bernard Korman.

Q Did you talk with Mr. Finkelstein?

A No.

Q Paul Marks?

A Just Bernard Korman. That is the man I spoke with.

Q What publishers did you talk to?

A I called Allen Arrow, and I think he came to our office in the morning or early afternoon, and I said, "Allen, my boy, how are you doing?" and he said, "I think I have some commitments lined up." I forget the names he gave me. He said that he knew he could deliver Frank Loesser, his client, and he read off Gene Goodman -- "The people that are in my camp will certainly go." I spoke to Sal Chiantia. Sal is very interested in this thing. Sal and I know each other a

long time. We have a vicious competitive instinct toward each other's firm when we are talking to an A and R man about his catalog or mine, but underneath it all we are friends who respect each other and know each other quite a while.

I said, "Sal, what the hell do you think about this thing?" and Sal and I had a conversation about it. And as this thing evolved I said to Sal, "I am inclined to go along with them because I have a feeling if we don't you and I are going to be standing out there in the snow looking at the warm bodies luxuriating in this thing. And why not? It looks like it's going to be hung up at ASCAP." And I wasn't able to reach any conclusion with Korman. I disagreed with them. And Sal and I made our own analysis of this thing. It was new to us. We weren't as concerned about some of the problems that ASCAP had and we said that if we do this directly we don't have to worry about the consent decree and some of these other problems that seem to have ASCAP up in the air.

As we analyzed it further we said, "There are only going to be 700 songs here, and if they pick 700 songs without yours or mine we have no

SOUTHERN DISTRICT COURT REPORTERS
[illegible]

chance at all of getting in this thing. It's completely different than the ordinary user who comes in and may use this and may use that. These are going on tape, they are going to be recorded once and that is it and that is the program." I said that "I am glad you are interested in this, Sal, because frankly I am leaning very heavily in going."

And I sort of disagreed with what I had heard from Mr. Korman that the rate was absurdedly low because the way Allen Arrow explained it to me the uses that these 3M machines would have were really not comparable with the uses of other wired background music services that had been going on in this country for years, from 1940 on. The big users, the big hotels, the big factories and big supermarkets, they were going to have background music. The way I saw it this machine was going to be sold to relatively small organizations and users of background music, and by that we were thinking of Allen Arrow and Lindgren had explained that this would mean a location such as doctors' offices, dentists' offices, restaurants, small stores. It was unlikely and improbable that they were going to sell these tapes to a General Motors

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

manufacturing plant and have the thing wired through the building.

3M really didn't see much market in competing with the established Muzak in other locations because they had long-term contracts, with forfeitures and so forth, and there would be really no advantage to anybody using Muzak, which had a wider scope and was an efficient organization, to buy one of these things.

The only practical source market for the machines were people that were playing music now which would entail a restaurant which was playing a radio -- it did have those nagging, annoying commercials which were sort of disturbing to dining comfort. And when the dentist was drilling on your upper molar it might be upsetting to hear about Crest toothpaste.

Quite seriously it was an attractive proposition and I saw it immediately as an attractive proposition. Therefore, I wasn't so concerned about the one-cent rate because I really felt that this device 3M had, this program they had, was going to open up markets. The music was being used anyway and we weren't getting a dime by and large.

We don't get a dime when a restaurant uses a commercial broadcast live in the establishment. We get that money from the broadcaster but we don't get it from the restaurant user. There is well-established law on that subject.

But if we get into --

MR. BLUMSTEIN: Don't get into that area. You have already said too much about what restaurants can do for radio and so forth. It has nothing to do with the lawsuit.

MR. HRUSKA: I think it is quite pertinent to the subject.

MR. BLUMSTEIN: I don't care what he says about what ASCAP gets, but I don't want him to characterize what the law is.

THE WITNESS: Any reference I make to the law is purely accidental and probably wrong anyway.

Q What other publishers did you talk to about this 3M project?

MR. BLUMSTEIN: Besides Sal Chiantia?

MR. HRUSKA: Yes.

A I don't think I spoke to anybody else in those initial stages that I recall. It may be

possible I did.

Q How about in later stages?

A I think we are going to lse the continuity of this thing.

By now I had worked my analysis of this thing up and Mr. Voltter agreed that if Allen Arrow was lining up really a sufficient contingent of publishers, and I trusted that he was giving me the straight facts on it and it looked like he was going to be able to make a direct deal, I said to Allen that I think he could count us in. "It's not a firm commitment, but when it looks like there is a no-nonsense way to go, I think we will have a deal."

I communicated that to Chiantia and also to Bernie Korman. I said, "Bernie, I have a difficult decision to make but unless ASCAP can close this thing fairly soon I don't think Arrow is kidding around, I think he has a group of publishers lined up where he can scrounge out here and there 700 songs that are more than suitable for background music. And the position I find myself in is that if ASCAP doesn't make the deal and these other publishers do make the deal, my company is locked out of it, and I just can't afford -- wearing my

first-and-foremost hat, that of being an officer of my company -- I can't afford to take the chance of dillydallying here and find that my company is not participating in this project."

I called Bernie Korman back again. I think I had this conversation with him at lunch. I called him back a day or so later and I said, "Bernie, we are getting very close to a handshake on it." And I knew Mr. Chiantia felt the same way because we mentioned to each other on the phone.

I said, "Sal, I am getting close to it," and he said, "So am I, Leon."

We agreed with each other's position. We knew the list of names of the other publishers that were involved, none of whom I consulted with because I had no reason to. I really did know that Allen Arrow would not deceive me or kid me about this.

And the day came -- and I don't remember just at what point, a week or two or three, something of that magnitude -- I shook hands with Allen and I said, "Count us in, but before you count us in let's talk about the deal. You offered me something before. If you don't mind, I think we ought to be

able to do a lot better with you considering the scope and significance of our catalog. It will make your job easier. And I want a bigger guarantee on the advance and I want a bigger guarantee of the number of songs you are going to use."

And he said, "I don't think there is any problem about that at all because we are really anxious to get some big catalogs in here and have as wide a choice as possible of big standards and things that lend themselves to background music."

And I said, "Allen, we have a deal."

I called Bernard Korman back and said, "Bernie, I want you to know, and relay this around, that we just agreed with Allen Arrow that we are going to enter into a deal with him."

That is the genesis of it.

Q Let's go back a bit. You said during your discussion with Korman, either at lunch or on the telephone, that you had a difficult decision to make. That is in the context of whether you should go along with the 3M proposition. Why was it a difficult decision?

A Well, it was a difficult decision because time seemed to be of the essence on this. Allen

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

was pressing that 3M wanted to go ahead with this, wanted to know what the figures would be or basically would possibly abandon the whole thing.

I said it's difficult to know whether I should go into this directly or wait and see what ASCAP is going to do. Maybe ASCAP will negotiate a higher rate and I might look -- not look but I might be foolish to have gone into this and agreed to the rate that 3M posed without a strong upward negotiation.

I did exert some pressure on Allen. I said, "Come on, Allen," irate, "what can we do about increasing?"

And "That is what the rate has to be, and with you or without you we are going to put the rate across."

He gave me some pretty solid reasoning, the facts I went through before about the kinds of uses and so forth, and the fact that it is more conceivable that a user would buy; after a few months of one tape 3M was putting out a 700 series, melodic and rhythmic, they were putting out two tapes, that the user would probably buy two tapes. That meant we were getting two cents per song.

SOUTHERN DISTRICT COURT REPORTERS
U.S. COURTHOUSE

Q If 3M had made a deal with ASCAP, Shapiro, Bernstein would not have had a guarantee as to the number of Shapiro, Bernstein songs that would be on the tape.

A Correct.

Q The chances are there would have been fewer Shapiro, Bernstein songs on the tape.

A Correct.

Q So I come back to my question as to why this was a difficult decision.

A When it was a difficult decision Mr. Arrow initially gave us a guarantee of using 25 songs. We might have gotten 15, 18 through ASCAP.

Q What did you end up with as a guarantee?

A One hundred songs.

Q There again --

A When I got the 100 songs, then it wasn't difficult. That is when I shook hands with him. I didn't have this guarantee.

I also explained to Allen Arrow, when I gave him a frank analysis of my reasons for not shaking hands immediately, that I didn't know that I might not be better off waiting to see what would

happne with ASCAP, that I was not too happy about this rate.

Q What was Korman's reaction to these thing that you told him?

A Quite proper, quite correct. "Leon, I can't tell you what to do. I am sorry that you seem to be upset about the prolonged negotiations but I am quite sure of the position ASCAP has taken in concern of the benefit and welfare of all its members and in connection with all the problems of the consent decree. It is correct we have been having problems with Mr. Arrow and company in these negotiations. We are not the only ones who seem to be on dead center on this thing."

He stressed things in the nature of "Thank you for keeping me posted and I appreciate your calling." And "I can't tell you what to do and you have to make up your own mind on this matter."

Q Let me read a portion of Mr. Arrow's testimony as a predicate for my next question:

"We were told by some of the publishers who did license 3M that it had been made clear to them that this was an act of disloyalty to

to ASCAP.

"Q Which publishers told you this?

"A Mr. Brettler of Shapiro, Bernstein, Mr. Levy of Leeds Music. These are the only two I can recall."

A In this testimony did he say when I told him this?

Q The immediately preceding testimony concerns a document marked in this examination as Exhibit 42, PX42. When I say this examination I mean the Arrow examination. The date of that document was December 21, '64, and the portion of the document read immediately prior to this testimony that Arrow gave was:

"At the time we left ASCAP" -- this is the 3M people -- "Bernard Korman said he thought it was wise to approach the individual members of ASCAP. Since that time we have learned that ASCAP has been approaching its own members to advise them not to deal with 3M."

Then the question was:

"Q From whom did you learn that ASCAP was approaching its own members and advising them not to deal with 3M?

"A We were told by some of the publishers who did license 3M that it had been made clear to them that this was an act of disloyalty to ASCAP.

"Q Which publishers told you this?

"A Mr. Brettler of Shapiro, Bernstein."

A Before you read this to me and before I

had any knowledge that this specific testimony existed, I just testified again under oath that when I told Mr. Korman this, Mr. Korman behaved in a quite correct manner and Mr. Korman said, "Leon, you are at liberty to do whatever you see fit in this matter."

MR. BLUMSTEIN: What is the pending question?

THE WITNESS: I want to ask a question. When Mr. Arrow made this quote he told me he looked in the diary to get the October 29th date. Did he look into the diary to get that quote, "an act of disloyalty," or did he look into his mind to get that quote?

Q This conversation was not necessarily a conversation that took place on October 29th. I gather this is a later conversation.

MR. BLUMSTEIN: Perhaps I can give a time frame. It's up to you.

Q Let me put the question to you this way: Did you ever tell Allen Arrow that any pressure had been brought to bear on any music publisher either by other music publishers or by an ASCAP representative in an attempt to discourage the music pub-

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

lisher from issuing a direct license to 3M?

A Well, I have to answer yes to that. I question the quotation that Allen Arrow used here that one or two or more people said it would be an act of disloyalty. I don't know if Mr. Arrow had this down in his minutes or notes or if that was his recollection. If that was his recollection of eight years ago it might be something like that. Them is pretty strong words, as we say in Texas.

Q What is your recollection?

A As we say in New York -- my recollection of is that nobody -- well, when I last called Korman and told him we are going to go into this thing, it was relatively close to another ASCAP board meeting and we had a handshake agreement with Allen, and we were even working on some concepts and drafts and so forth and so was Sal. Nobody called me, nobody.

In this interim period when this had been going on, the conversation with Korman and so forth, the next time this came up was at an ASCAP board meeting, which I recollect in a sense was within a week or two of this at which time in the report of counsel to the board, counsel reported and disclosed

SAM A. GIBBON DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

that 3M have a background system, which he briefly described, and it's come to his attention that a group of ASCAP publishers, including two companies represented on the board, have entered into a direct deal with 3M.

Again trying to recollect what happened eight years ago, somebody said or insisted who the two publishers were, and Mr. Pinkelstein said, "Shapiro, Bernstein," and he pointed to me, "and Leeds Music," and he pointed to Sal.

The board consists of 12 writers and 12 publishers. I don't remember how many people were there. Usually there are 15 or 18. Most of the writers had no knowledge of this thing and were confused, I will say.

Q Euphemistically?

A No, quite seriously. This thing comes up and who are the members, and I saw some blank faces. Most of the publishers on the board had already been approached by Allen Arrow.

In retrospect -- you asked me who did I speak to, and as I now recall, I did speak to one outside publishing firm. I spoke to a representative of Chappell & Company.

Q Ricketts?

A No. Do you want his name?

Q Yes.

A Phil Wattenberg. At that time Mr. Max Dreyfus had just died. He was the operating head of Chappell in New York. I think Mr. Louis Dreyfus had been appointed to the board but hadn't shown up at a meeting or two or may not have been on the board. And Phil Wattenberg and I had been friends, and I know Allen Arrow had contacted Chappell as well and I called Phil Wattenberg and I said, "Phil, I just want you to know that Shapiro, Bernstein is on the verge of going into this as a direct deal and we will take it from there."

That, to the best of my recollection, is the only outside -- other than the conversations with Sal Chiantia -- that was the only conversation I had. That was a conversation I initiated.

Getting back to the board, it would be misleading to say that you have to understand this in the context which it happened. This came as surprising news to most of the members of the board. Most of the writers and some of the publishers,

SOUTHERN DISTRICT COURT REPORTERS
United States Court House

that is. I don't know who knew about it in advance through committees and prior conversations with Herman Finkelstein the day of the board meeting and so forth but I got an impression that from somewhere at one end of the table some cannonballs were coming my way, and I sensed it wasn't the 18th Overture: "What are you guys doing? How did this all come about? Why did you license direct? What does all this entail? Don't you have confidence in the legal department?"

And there was some rapping at the table for order from President Stanley Adams, which is not the first time that Mr. Adams raps for order and not the first time that an energetic conversation has evolved. But let's face it, this did come as a jolt. It was something that was new. It was something that was news and something that was surprising. And there were some comments directed toward both Sal and myself. I can't quote them directly. I don't know because sitting in a room with a lot of static flying around, I don't think if you had interrogated me 10 minutes after the board meeting, I couldn't say who said what because everybody was talking at the same time.

That lasted about 10, 15 minutes, and we said, "Listen, the deed is done. We have done it."

When Stanley had the meeting quieted down and people were communicating with each other in a more temperate rather than intemperate manner, not all talking at once and having side conversations, Stanley got the meeting in control, and I said, "I would like to explain it in our viewpoint and I gave pretty much the explanation that I just gave you, that I saw this as an experimental thing, that if it happened on the scale that 3M expected there were going to be more tapes, 3M would have to go back to ASCAP, and possibly it was a fortunate thing for us to do this, because if the venture flopped, nothing ventured, nothing gained; but if the venture succeeded and this became the new modus operandi of background music, it would come back to ASCAP anyway. And anyway, it's done.

I think I reported some of this aback to Allen Arrow. I said, "Allen, you have to consider me a good friend because we took a little" -- how shall I say -- "a little excitement there at that meeting," and since I am under oath, I was a little bad

boy to my friend Allen Arrow because I took some poetic license, I have to confess to him some day, I exaggerated to him also because I am prone to exaggeration except under oath. I didn't mind ingratiating myself with him further.

But the facts of the matter are pretty much as I described them. I said I don't exaggerate under oath. I use the expression cannonballs came my way, that was an exaggeration; actually it was spear and harpoons.

Q There were heated words at this meeting?

A Yes, like "What are you guys doing?"

Again I have to repeat in the context of how it was announced and the pressure of how it was done. It did take some people by surprise.

Q Weren't there people in that room who felt that in an area of licensing where ASCAP is competent to act, the individual members of ASCAP, including the publishing companies, should not issue direct licenses?

A Well, I am a board member of ASCAP. I am very concerned with ASCAP activities. I think I am a very loyal board member of ASCAP. I think I am a very dedicated and diligent member of ASCAP.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

Q And you don't feel that way?

A I took the initiative. I could say I was pressured into it by copout and say I was pressured into it by my company. I am telling the truth. I took the initiative with my company and took the initiative of making this deal directly.

Q But isn't it fair to say that there are quite a number of ASCAP members who don't feel that way?

A Members or directors?

Q Publisher members.

A I don't know. I just know Allen Arrow didn't have too much trouble lining up 50 ASCAP members because he did this within two or three days; zip, zip, zip, and he got 50. That is, for this particular use.

Q Were there members at that board meeting who expressed the view in words or substance that in a licensing area where ASCAP is competent to act, individual members should not issue directly licenses?

A Well, I don't remember this kind of direct quote.

Q I didn't say it was a direct quote. I

said words or substance.

A How about thoughts of substance? I had Leon Brettler, individually, who had thoughts of substance along those lines, too. I said, "I wonder if what we are doing here' --

Q Is disloyal?

A No, not disloyal --"has any implications or might set some precedents that I will be sorry about because my neck is out on the block on this thing."

Q Precedents for what? That is, that you might be sorry about.

A We described the benefits of joining ASCAP. If every ASCAP member licensed every use directly and ASCAP dissolved because everybody was flying off in a million different directions and ASCAP had nothing to license, you bet I would be sorry about it, and so would every member in view of my testimony.

Q Would you issue direct license to a television network?

A You are asking me this under oath. You are almost commencing a negotiation now, right?

Q Suppose negotiations bogged down between

ASCAP and a television network, do you think ASCAP members ought to issue direct licenses to a television network?

A I honestly and sincerely can't answer that question yes or no now because this, again, is one of your beautifully phrased hypothetical questions in which you don't give me enough information. Why did the negotiations bog down? How long have they been bogged down? What are the other options?

I don't think it is comparable at all to talk about what we did here with a very limited use involving only 700 songs, only for background, at an experimental rate, for an experimental use. I don't think the magnitude of that decision -- and I know how long it took me to come to that conclusion; I wrestled with this for a week or ten days. You are asking this and you are expecting an answer right off the top of my head. I just can't give you that answer.

Q Do you believe that a goodly number of ASCAP publisher members would have the feeling right off the bat that they should not license a television network under those circumstances?

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

A Well, I think I indicated in my testimony all along here that I personally have the feeling that direct licensing of television networks would be -- I think I used the word -- self-annihilation as an industry. I think what we are talking about in licensing television networks and what we are talking about in what we did in licensing 700 songs to 3M on a limited, experimental basis, on something that might be analogous to television in 1945, when there were just a few sets out and one or two broadcasters -- ASCAP did basically what we did with 3M basically in the early days of television.

Q You think it is night and day?

A No, that is only 12 hours apart. I think it is 360 degrees. I think it is more. I think it is grains of sand compared to watermelons.

Q Yet there were members of the ASCAP board at that meeting you have described who had the feeling that you should not have issued direct licenses to 3M?

A Did I say that?

Q I am asking that as a question.

A With the inflection that you used it

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

came out as a statement.

Q It's a question.

A It didn't have the rising inflection.

Q It's a question.

A It's difficult for me to really recollect what really transpired and who said what and what who said because the conversation seemed just as I said, what who said and who said what.

Q I am not asking you for the names of people who said this; I am asking you whether this sort of sentiment was expressed.

A I think the sentiment was expressed, "We hope you fellows know what you are doing."

Q More than that, Mr. Brettler.

A Because the announcement was made that it had been done. There was no way the -- the contracts were signed and there was no way of undoing it, and everybody kept saying -- I was saying just "Calm down. Let me explain it. The deed is done and the contracts have been signed."

Q Did anyone express the view in words or substance that what you done was disloyal to ASCAP?

A I don't know about the word "disloyal."

It was expressed to me that what we had done might be a very foolish business venture on our part and that possibly we should have given ASCAP more time to negotiate it; I may have jumped the gun on this thing and I should have been a little more patient and so forth, words of that nature.

We are basically gentlemen on the board, the board members. We try to conduct ourselves with some degree of decorum and sensitivity toward the feelings of other people. There is practically no what you might characterize as name-calling at board meetings unless it's done obviously as a jest or a joke.

The reason I don't think anyone said to me that I was disloyal to ASCAP was because I know what that reaction would be and it would be quite a defensive reaction because I don't think in any sense of the word that I was disloyal to them. I would have remembered my response on this.

Q We are having trouble with the word "disloyal."

A I am not really nit picking with you on this.

Q Did anyone express to you the sentiment

that what you had done was not in the best interests of ASCAP?

A That sentiment I think was expressed in the round robin of 15 people trying to speak at once to find out what happened and why some people seemed to be upset and some members saying, "What is this all about? It indicates that our legal department wasn't -- that you fellows thought our legal department wasn't functioning. Shouldn't you be more patient? Why did you do it?" This sort of sentiment.

I don't think really anyone said this is an act of disloyalty. As a matter of fact, if it were considered an act of disloyalty none of us directors have contracts with ASCAP. The way we get to be directors is initially by nomination, and every two years there is a vote taken of the membership. There is weighted voting. The board is not self-perpetuating, and I am reasonably confident that if there was a ground swell or any feeling that what I did or what Mr. Chiantia did or what any other member of the board has done that is an act of disloyalty, malfeasance, any synonym of that nature, I think it is reasonable

to expect that at the next election that particular gentleman -- and if he is disloyal I would not call him a gentleman -- that particular person in that case would not find himself on the ASCAP board in consecutive years.

I am happy to say that I have been re-elected at every election to the ASCAP board, and at the last election of the ASCAP board -- by the way, Mr. Chiantia was in an identical position that I was. Mr. Chiantia was in an embarrassing position for another reason. His associate, Mr. Levy, had indicated to a few poeple, for what-ever reason there may be between Mr. Chiantia and Mr. Levy, that Leeds wasn't going to do this when in fact Leeds had made the commitment; Sal had the handshakes. I don't know if the contracts were signed. I don't know to this day what transpired in their company but there was some commotion about that particular aspect. Lew Levy said Leeds wasn't going to do it, that was an aspect.

If Mr. Chiantia or I were considered disloyal you can bet that word would have seeped through the grapevine and we would not have been reelected to ASCAP. The last election of ASCAP

I believe Mr. Chiantia got the highest tally of all us 12 publishers in terms of the number of votes cast for him on the board.

Q If the CBS Television Network cancelled its ASCAP license and announced that it was going to start obtaining its performance rights needs by direct licensing with music publishers would you think that the publishers who issued such direct performance rights licenses to CBS were being disloyal to ASCAP?

A I think any publisher has a clear, unqualified right to issue a direct license because our agreement with ASCAP under the consent decree calls for a nonexclusive license.

Q I am not talking about their rights. I am talking about whether you would feel that the publishers who did this were being disloyal to ASCAP.

A I don't feel that they were being disloyal to ASCAP, but I do feel they might be -- let's say, again, knew what they were doing, had analyzed it carefully and didn't just jump in semi-hysterically or imprudently, depending on the circumstances. It might be disloyal to themselves

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

in their best interests.

Q Is there any question in your mind, Mr. Brettler, as to whether a substantial number of ASCAP publishers would feel that the publishers who had issued direct licenses to CBS were being disloyal to ASCAP?

A Is there any question in my mind -- I can't put my mind -- we went through this yesterday. I can't speak on behalf of the publishing fraternity. I don't have as good friends and close colleagues of my competitors. The people on the ASCAP board I see once a month. Those on MPA I see twice a month. With the exception of Sal Chiantia --

Q Mr. Arrow said at page 232 of the transcript:

"Q Can you recall the conversation in which Mr. Brettler told you that ASCAP publishers, himself included, were being pressured by ASCAP not to deal with 3M?

"A Yes, I recall his saying that to me several times."

Did you say this to Mr. Arrow?

A I was lighting a cigarette.

(Question read.)

A If Mr. Arrow and I must engage in who has better recall of direct quotations of eight years ago, I don't recall saying just those words. I do recall saying that I wouldn't be surprised if -- I may make people who are friendly with me a little unhappy for a number of reasons, some of them being that I stole the march on some of my colleagues on the board in the competitive nature of this thing. I think that I did something that was very good for my company and I clearly understood that some of the publishers could be considerably irritated by the fact that we did and they didn't.

Q What were the other reasons? You said for a number of reasons.

A The number is two.

I think the second meeting I had there with Allen -- we are not used to direct licensing and it hasn't been going on and I don't know what the long-term impact and the long-term repercussions of this thing are, and lo and behold I find eight years later there are apparently long-term impacts and repercussions becauseyou are asking me intently about this.

Q Is it your testimony that you never told

SAN DIEGO DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

Allen Arrow that ASCAP was pressuring publisher members, yourself included, with respect to their licensing of 3M?

MR. BLUMSTEIN: One aspect of that question has to be clarified for Mr. Brettler. That is, Mr. Arrow's deposition when he used the term "ASCAP," I think at several points he explained he didn't know whether he was talking about ASCAP management or other ASCAP publishers.

MR. HRUSKA: I will accept that.

A I can categorically state that I got no -- that what I said about the reaction to Bernie Korman, that was my one and only contact with anybody from ASCAP management, and what I testified was correct and that Bernie Korman was completely correct in this and said, "I can't tell you what to do," and didn't tell me what to do.

Q What about other ASCAP publishers?

A I also testified that I spoke to Phil Wattenberg and he said, "Thank you for telling me about this, Leon," and didn't exert any pressure. And that the next evolution or the next exposure I had to anybody in the publishing business was at the ASCAP board, where there was a surprise announce-

SOUTHERN DISTRICT COURT REPORTERS
United States Court House

ment, and for an interval there 15 or 20 people talking at once, side conversations, people sitting next to Sal saying, "What is it about?" and people sitting next to me saying, "What is this about?"

I think that after the board meeting -- I don't know when after the board meeting -- I told Allen that we had an energetic conversation. I don't remember the exact words but I pretty much reported back to Allen what I have just told you.

I did have -- I said I had no conversations leading up to that board meeting. I did have a conversation after that board meeting. If you want me to get into that I will get into that.

Q Please do.

A I had a conversation with a gentleman by the name of Victor Blau, who was at that time the head of Warner Brothers Publishing Companies. We walked out of the meeting together and he said, "Come on, Leon, let's have a cup of coffee, I want to talk to you about this thing." It wasn't like a prearranged meeting. It was accidentally that I happened to be leaving through the door with him about the same time and went down in the elevator with him at about the same time, and Mr. Blau

said, "Boy, I hope you fellows know what you are doing here. This thing doesn't make any sense to me at all and you are setting precedents here on rates and so forth. You young Turks" -- I am not sure the "young Turks" was the quotation but that was the implication -- "you young fellows go into these things slap-dash and you better be careful because a lot is riding on what publishers do and how they do it."

I remember this conversation because I was a little awed by Mr. Blau, if not intimidated by him, because he had only been a recent member of the board, a few months before this came up, and he did represent a very large company. Mr. Blau is a very forceful and dynamic man, 20-some-odd years older than me. There was a generation gap, and I think out of my own modest way of functioning I am more relaxed with contemporaries of my own age, and I am really happy that you gentlemen on the opposite side of the table here are contemporaries of mine.

I think frankly I wouldn't be quite as flip and light-hearted with a gray-haired gentleman as I am with a couple of fellows --

Q Whippersnappers?

A Yes. I think you understand what I'm getting at. I was more respectful to Mr. Blau, and Mr. Blau was a person who had a very important position with Warner Brothers over the years on the West Coast. He stood there as a new person to me.

I liked being on the ASCAP board. Warner Brothers has a nice slug of votes that I certainly didn't want to go out of my way to lose and I really didn't have any intention of deliberately having a nose-to-nose, head-on confrontation with Mr. Blau when it was not necessary.

Mr. Blau irritated me to no end at that coffee clatch of ours, and I just said, "Mr. Blau" -- by that time I called him Victor -- "Victor, the contracts are signed. You seem pretty upset with me."

I said, "I repsect you but in all candor, of all the people on the board to take the position you are taking with me it is the most surprising because you come from a company, Warner Brothers, that was the first company in the history of ASCAP that ever was a maverick, that ever licensed direct."

Because I vaguely recalled hearing about the fact that Warner Brothers some time in the '30s, under the guidance of the late Herman Starr, struck out on its own and experimented with direct licensing, and as I get the story, I wasn't there -- it is not terribly germane -- but as I understand the sory he came back with his tail between his legs and that venture wasn't as successful as he thought it would be and he did come back to ASCAP.

"You come from a company of mavericks yourself, so if you don't mind, what is wrong with being an innovater? And what is wrong with being intelligent, as I think I am? And what is wrong with being competitive?"

And he laughed and we shook hands and we were friendly ever since. Whatever animosity there may have been at that coffee clatch dissipated by the time we left the place and he cooled down and I was very happy about it.

I might have come back to Allen Arrow, and Allen made me slightly confused about the timing of this, and said, "Oh, boy, Victor Blau laid it on me heavily," and there might have been implications of disloyalty stemming from that particular conver-

sation.

To the best of my recollection, and considering that I am under oath and fully recognizing that you are going to call other witnesses who were there and so forth, I am doing my very best to level with you and honestly report the true nature and substance of my best recollections on what really happened, what I said to Allen Arrow, when I said it to him, in the context I said it to him, and I am trying to get on the record in front of you and the record the context in which this announcement was made at the board, the timing of the thing, the sudden jolt, and the fact that I sort of shamefacedly -- if the notes were being taken in Technicolor you might see my face red.

I did fib a little bit to Allen about some of the problems that I felt. I did feel a little bad because I like to be popular, I like to be everybody's friend, and I don't want to be in a position where 15 or 20 people get some surprising news and suddenly call me on the carpet and say, "What are doing?" and so forth. Life is simpler if you don't have to go through those kinds of afternoons.

* * *

* * *

can't say for sure that I was, but I believe I was.

Q Do you remember any discussion at that board meeting or any other ASCAP board meeting regarding Mr. Wood's letter of December 19, 1969 or the subject of a per-use license for the CBS Television Network?

A I recall a board meeting or board meetings. The board was advised that CBS was making this claim for a per-use license, a new form of license, and, as I recall, this came about right at the very end, I think the last day or two of December 1969. So the answer is yes.

Q Do you remember any discussions that you had prior to the board meeting of January 29, 1970 regarding the CBS request for per-use license?

MR. SHAPIRO: You mean Mr. Brettler personally, or do you mean the board?

MR. ERUSHA: Any discussions in which Mr. Brettler participated, within or without the confines of the board.

A I have just a vague recollection of it. I think this thing was brewing some months before, and I am -- I can't say precisely what I recall, but I just recall we were aware that CBS was threatening at the time to go in another direction.

* * *

* * * D 252

with the concept decree, for one thing.

Q In January 1969 --

MR. BLUMSTEIN: '70.

MR. HRUSKA: I am sorry.

Q In January 1970, you had some familiarity with the concept, at least, of per-use licensing?

A Yes.

Q Do you recall any discussion in ASCAP board meetings, or in an ASCAP board meeting concerning the NBC Television Network application to ASCAP for the so-called limited repertory or nucleus license?

A Yes.

Q Do you remember roughly when that was?

A No. Couple of years ago, I think.

Q Could you give me the substance of that discussion?

MR. BLUMSTEIN: Again, bearing in mind my objection to any communications voiced by counsel.

MR. HRUSKA: You mean to encompass in that reports of fact by counsel which did not express legal opinions?

MR. BLUMSTEIN: No.

A Certainly, counsel told us the facts.

* * *

* * *

per use I had a mental crisscross in my mind. I was thinking of per program. I think ASCAP licenses per program, on a per program basis.

Q You mean when you referred to the fact that some users and I think you mentioned radio talk stations --

A Something of that nature.

Q -- had ASCAP per use licenses, you really meant ASCAP per program licenses?

A Yes.

Q Do you know of any user who has obtained an ASCAP per user license?

A No. I never get into the details of this.

Q Would you know a per program license is a license under which a user, say a broadcaster user, would pay to ASCAP a certain percent of the time income generated by each program which used any ASCAP composition, per cent?

A I presume that is a reasonably good characterization of what I think it is.

Q Now, do you recall the time that NBC asked ASCAP to quote terms on a per program license for the NBC television network?

MR. KORMAN: Fix a year, Alan.

A This is different than the list of the

2200 songs you are talking about.

Q Yes, right, different from that. Well, this occurred in 1970. You remember that, the NBC request that ASCAP quote per program terms to the NBC television network?

A Was this simultaneous with or after the other application on the 2200 songs, it is vague in my mind.

Q I think the first request was prior to the application for for a limited repertory license.

MR. KORMAN: I think it was in 1969, Alan, if that helps you.

MR. HRUSKA: Thank you.

MR. KORMAN: Okay.

Q October 14, 1969. You recall that?

A It is three years ago. I just don't recall with any clarity. You can understand the questions I was asking you. The thing is vague in my mind.

Q Were there any discussions in an ASCAP board meeting concerning NBC's request to quote per program terms?

A It is inconceivable that there weren't discussions about it but I don't remember what they were.

Q You remember whether there was any expressed

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

attitude concerning the prospect of quoting per program terms to NBC?

A No, I don't remember specifically what the expressed attitudes were.

Q Do you remember whether Mr. Finkelstein was authorized to negotiate a possible per program license for the NBC television network?

A Mr. Finkelstein has an ongoing authorization to the extent it is taken for granted that as our chief counsel to enter into negotiations with all users and this is just part of the year-by-year functioning of ASCAP and its licensing activities to sit down, talk to people, negotiate with them, take a reasonable position, work it out.

Q Was anyone authorized to quote a per program fee to NBC?

A I stated before that this thing going back three years is vague in my mind and I can't accurately respond to that question because I just don't remember.

Q Have you ever heard any point of view expressed in an ASCAP board meeting regarding the appropriateness of a per program license for a television network?

A Appropriateness? I don't recall any specific conversations about it. I presume there were

some.

Q Have you --

A And I think, I am not sure, I think there is something in the consent decree. I do recall having some knowledge there is something in the consent decree that gives users the option of blanket or per program licenses. I have known that for many years.

Q Do you personally have any view regarding the appropriateness of a per program license for a television network?

A Well, that is one of your broad questions that I would have to say -- well, if you can narrow it down when we talk about what program, why, who, how, where, might come to some conclusion but I don't have a broad general attitude about it that I could characterize as a yes or no clearcut thing.

Q Do you recall whether any report was made to the ASCAP board on the subject of seeking further information from NBC prior to any negotiations with NBC concerning the grant of a per program license to NBC?

A I think in our directions to the negotiators that it is taken for granted we post the responsibility on the negotiators to negotiate and conclude a contract or a license that all the necessary steps are going to

be taken including a full open discussion pro and con, back and forth, to get these issues resolved.

Q Mr. Brettler, isn't it a fact that at an ASCAP board meeting you have heard expressed the point of view in words or substance that ASCAP was going to make it as difficult as possible for NBC to pursue a request for a per program license?

MR. BLUMSTEIN: Objection to the form; go ahead.

A I will say absolutely not.

Q You have never heard any such sentiment expressed?

A Not in the way you characterized it.

Q How would you characterize it?

A The way I have in my previous testimony today.

Q Complete willingness to --

A To sit down and negotiate with an open mind and when we think that a proposal is not right for whatever reasons, then to defend it and argue it and if a lawsuit is brought to defend it and take the position that subsequently develops in the testimony, the documents in these proceedings.

Q Would you be surprised to hear that any television

* * *

* * *

Q Is there any way that you can describe the speed with which mechanical rights transactions are now made through the intermediary of the Harry Fox Agency?

A Speed is not of the essence.

Q Perhaps not, but could you tell me how long it takes in a general way? For example, could you give me a range, anywhere from X hours or days to Y hours or days?

A Let's say that when a record company wants to record a song they will either phone or mail in a request for license to the Harry Fox office and within a matter of days a license is sent out to the record company with a copy to the publisher.

Unless there is something unusual about the license that requires the Fox Agency to contact the publisher and request a rate, request for a concession, request for a favor, a request "would it be okay to use a title of a song as a title of an album," things like that, so then there is additional delay.

Q Does Fox have a price list?

A Of course not.

Q A list of suggested prices?

A Of course not.

Q You have never seen such a thing?

A When you say a list of suggested prices, over a

period of time certain trade practices have developed. Record clubs customarily get a one and a half cent rate instead of two cents. You might call that a list of prices. It's just a trade practice that has evolved and it's there.

Low price records customarily are licensed at a lower rate than the two-cent rate, but every publisher has the right to ask for the full rate or give it away for nothing and every publisher has this right. Many publishers exercise their rights in different ways and have different forms of licenses and ask for certain things; arrangements all over the lot. I can't even make that general -- an accurate generalization on that.

Q Does Fox have any list or set of suggested prices for any sort of synchronization rights license transaction?

A Absolutely not.

Q Have you ever seen a list of suggested prices?

A Absolutely not. The Fox office is meticulous about acting as intermediary and not as a principal.

Q You mentioned before certain discounts offered to various types of users. Are those discounts reflected on a list or a document of some sort?

A They are reflected on the mechanical license form. Every company authorizes the Fox office to use a

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

mechanical license form for that company. And that form licenses a use of a song on a record and it says if -- and I am not quoting the exact amounts, I just don't remember them, but there are phrases such as "If the record comes out under $2.98, the rate instead of being two cents should be one and a half cents" or "one and three quarter cents." Printed right on the license form.

Q The prices are in the form?

A When you say prices, the royalty rates to be paid are in the form. In the form of license, that is.

Q I take it you have copyies of such forms in your office?

A Sure.

Q What about the forms on the synchronization rights licneses, do they have any royalty rates or prices set forth?

A No. No, the contracts are boilerplate that comes out of the Fox office and the lines where prices, term, territory, use are are all left blank and that's the result of negotiation.

Q Anyway, you are notified by the Harry Fox AGency when some record company wants to obtain a mechanical rights license from Shapiro Bernstein, right?

A Yes, in the manner I described. They send the

* * *

MR. KORMAN: It occurs to me as a lawyer who knows nothing about synchronization rights that people might want to record more than once or might not know how frequently they want to record, might want to make some extra copies and might not know when.

MR. HRUSKA: Do you have any idea what a synchronization rights --

MR. BLUMSTEIN: If you will be sworn, I will take the witness too and we will proceed.

Q Why doesn't the Harry Fox Agency act as a clearinghouse for television performance rights to music?

MR. BLUMSTEIN: I object to the form of the question.

A There is no reason for the Harry Fox Agency to do that.

Q Because ASCAP does it?

A The system is there and it's working.

Q You refer, of course, to the ASCAP system?

A The present system, which is the ASCAP system. The BMI system too. The system of licensing is there.

Q Why doesn't ASCAP handle performance rights transactions for television network programs in the manner that the Harry Fox Agency handles synchronization rights license transactions for those programs?

MR. BLUMSTEIN: I object to the form of the question.

A Under the way the system has developed and evolved over all these years, there is no necessity to do it.

Q Aren't there some advantages in doing it that way?

A I can't think of any.

Q For example, you could get a higher price when Marlene Deitrich was destined to sing a song than when Captain Kangaroo was planning to sing a song.

A Well, you characterize advantages as only being in terms of money. How would you like to sit at my desk, spending a full time day with all kinds of things and now have to take another slew of phone calls where you have to start thinking about this and thinking about that and that certainly wouldn't be an advantage.

Q You are not set up to do this now, are you?

A Definitely not. As you can tell by my testimony.

Q How long would it take you to get set up to do this?

A I have no idea.

Q Do you know whether ASCAP and -- whether

***

lhg.

EXCERPTS FROM THE DEPOSITION OF SALVATORE CHIANTIA

UNITED STATES DISTRICT COURT

D 263

SOUTHERN DISTRICT OF NEW YORK

- x

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff,

v.

(M.E.L.)
69 Civ. 5740

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Defendants.

- -x

March 28, 1973
1:45 p.m.

Deposition of SALVATORE CHIANTIA

taken by plaintiff pursuant to stipulation and notice, at the offices of Cravath, Swaine & Moore, Esqs., One Chase Manhattan Plaza, New York, New York 10005, before Laurence Hannefald, a Certified Shorthand Reporter and Notary Public of the State of New York.

APPEARANCES

CRAVATH SWAINE & MOORE, Esqs
Attorneys for Plaintiff
One Chase Manhattan Plaza
New York, New York 10005
ROBERT S. RIFKIND, Esq.,
ROBERT K. BAKER, Esq.,
of Counsel.

PAUL WEISS RIFKIND WHARTON & GARRISON, Esqs.,
Attorneys for Defendant ASCAP
345 Park Avenue
New York, New York 10022
JAY TOPKIS, Esq.,
MARK BELNICK, Esq.,
of Counsel

-and-

HERMAN FINKELSTEIN, Esq.,
BY: BERNARD KORMAN, Esq.,
of Counsel.

HUGHES HUBBARD & REED, Esqs.,
Attorneys for defendant Broadcast Music, Inc., et al.
One Wall Street
New York, New York
RICHARD WILE, Esq.,
of Counsel.

SIMPSON THACHER & BARTLETT, Esqs.,
Attorney for Salvatore Chiantia
One Battery Park Plaza
New York, New York
EDWARD C. MENDRZYCKI, Esq.,
of Counsel.

...

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that such deposition may be signed and sworn to

before any officer authorized to administer an oath.

S A L V A T O R E C H I A N T I A , called as a witness, being first duly sworn, testified as follows:

EXAMINATION

BY MR. RIPKIND:

Q Please state your name and address for the reporter, Mr. Chiantia.

A Salvatore Chiantia. 42 Greenbriar Lane, Port Washington, New York.

Q What is your occupation?

A I am an executive with MCA.

Q What is your title?

A I am president of the music division.

Q Do you hold any other offices?

A I am also a corporate vice president.

Q Of MCA?

A Of MCA, Inc. That's correct.

Q Any others?

A I hold other titles, yes. Outside of MCA.

Q What are they?

A I am president of the National Music Publishers Association, vice president of ASCAP and a member

* * *

* * *

has not in a very long time.

Q How far back would that be?

A Some time back in the '40's. I believe it was 1945.

Q What did it do at that time?

A It had something to do with negotiating a contract with the songwriters.

Q Is that contract what is commonly referred to as the Standard AGAC Form Contract?

A That's correct.

Q Is that the form still in use?

A It is; yes.

MR. TOPKIS: By AGAC, you mean?

Q By a substantial number of writers and publishers?

A Yes. That is correct.

MR. TOPKIS: What does a substantial number mean? Does it mean seven or does it mean eighty per cent of the people functioning, or what?

MR. RIFKIND: We will get to that. Let me get to it by two intermediate questions.

MR. TOPKIS: By all means.

Q Let me show you, Mr. Chiantia, Plaintiff's Exhibit 31 for identification to make sure that that is

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y. WORTH 4-7490

the contract we are talking about.

A This looks like the form, yes.

MR. TOPKIS: It says "Copyright 1948 and Copyright 1969", so some time or other presumably this form was in use.

Q Let me ask you, Mr. Chiantia: Does Leeds Music today use this form of contract with any of the writers who write for Leeds?

A If they are AGAC members, yes, we do use that form of contract.

Q Only if they are AGAC members?

A Correct.

Q There are a number of other publishing companies affiliated with Leeds, are there not?

A The same obtains.

Q All of the MCA group of music publishers will use this form of contract with those writers who are members of the AGAC?

A That's correct.

Q What if a writer who is not a member of the AGAC requests that this form of contract be used?

A If he is important enough to us, we will give him the AGAC contract.

Q If he is not that important to you, what form

* * *

UNITED STATES COURT REPORTERS

* * *

MR. TOPKIS: To save time, I will direct the witness not to answer. You have both contracts and can compare them without taking his time.

MR. RIFKIND: I think, Mr. Topkis, that I am entitled to know the ones that Mr. Chiantia regards as being important.

MR. TOPKIS: We will disagree on that.

Q Do you know how many writers are members of AGAC?

A No; I don't.

Q In your experience, are many of your more important writers members of AGAC?

A Times change, Mr. Rifkind. There was a time when many of our more important writers were members of AGAC, but in recent years we have been getting our material from other sources and not directly from AGAC members.

Q Is it true today that many of your important writers --

A I have no writers under contract, Mr. Rifkind. I have no writers under contract, under exclusive contract to me.

Q Many of the more important writers whose works you publish, that is, the MCA group publishes,

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y. 10007 TELEPHONE, CORTLANDT 7-4580

are AGAC members?

A No.

Q It is not --

A It is not true today.

MR. KORMAN: Speaking of currently, you are inquiring? Is that what you are talking about?

MR. RIFKIND: Speaking of the catalog of works published by the MCA group.

THE WITNESS: Oh, in that case I would say that a large number of the compositions have been written by AGAC members. That's correct.

Q Since the work that you referred to as occurring in the mid-40's in the development of, I take it, this contract, Plaintiff's Exhibit 31, have there been further negotiations between NMPA and AGAC with respect to the revision of the AGAC Standard Form Contract?

A No; there have not been.

Q Have there been any communications in between AGAC and NMPA with respect to the possible renegotiation of the ABAC contract?

A No formal communications that I can remember, no.

Q Have there been any informal communications?

A Yes. I believe there were.

Q Can you recall about what year those took place or the time they took place?

A Some time before -- some long time before I took president.

Q That is some time before '67?

A That's correct.

Q Was it while you were a member of the NMPA board?

A Yes.

Q Some time between '58 and '67?

A I would say yes.

Q Do you know what the principal elements of the revisions sought or discussed were in those informal communications?

A No; I do not.

Q Have there been negotiations between NMPA and AGAC with respect to any other subjects, to your knowledge?

A No negotiations, no.

Q Have there been any communications?

A Yes.

Q With respect to what other subjects have there been communications?

A We had -- that is, I had, together with Mr. Reist, who is our executive vice president and an occasional member of our board, two meetings, I believe, or possibly three meetings, where the president of AGAC, his counsel, and I believe there may have been a third person present from AGAC. I don't quite recall --

Q The president being Mr. Lane?

A At one meeting -- on one occasion Mr. Lane was president, and perhaps on two other occasions Mr. Eliscu was the present.

Q The counsel present?

A -- was Mr. Deutsch, I believe. I am sure it was Mr. Deutsch.

Q Present for NMPA was yourself and Mr. Feist?

A Mr. Feist and perhaps another board member.

Q When did these meetings take place?

A In the last few years.

Q Since 1967?

A I can't fix it for you exactly, but --

Q When was the most recent meeting?

A I think some time last year we had one meeting, and -- in the last two years, last two, three years.

Q What were the subjects under consideration at

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

those meetings?

A Copyright revision, almost exclusively, as a matter of fact.

Q Were there any other subjects discussed other than copyright revision?

A Yes. At one time they did mention the fact that they wished that we could do something about getting publishers to pay their royalties on time.

Q Were you able to do anything about that?

A No, not really.

Q That is, royalties on mechanical rights?

A On all rights.

Q And graphic rights?

A Graphic rights, mechanical rights, foreign royalties, subsidiaries, anything for which a publisher would be responsible --

Q What are some other --

A Licensing compositions for certain purposes, commercials, licensing other people to print.

Q I think you said that you were a director of ASCAP.

A That's correct.

Q Refresh my recollection. Since when have you been an ASCAP director?

***

SOUTHERN DISTRICT COURT REPORTERS
U.S. COURTHOUSE
FOLEY SQUARE, N.Y. 10007 - DEVLAND 7-4580

endeavors we may be on the way to a hit.

Q Do you seek to promote the recording of musical works in your catalogs at MCA Records?

A Yes.

Q MCA records or their subsidiaries in fact record music from the MCA publishing catalogs?

A They do. I wish they would record more, but they don't.

Q Mr. Chiantia, I show you the last two pages of the complaint in this action beginning with the words "Wherefore, plaintiff demands judgment," and ask you to read it.

(Pause.)

A Okay, I have read it.

Q Having now read the demands of the complaint, do you now have an opinion as to whether the relief sought by CBS in this action is desirable or undesirable from any point of view?

MR. TOPKIS: Is that all of the relief that CBS asks in this action? Is that what you are asking the witness?

MR. RIFKIND: Let us start on all of the relief.

MR. TOPKIS: That doesn't help us.

Q I am referring to the relief referred to in the paragraphs you just read. Why don't you take them a paragraph at a time.

MR.TOPKIS: What is your question about paragraph A?

Q Do you now have an opinion, Mr. Chiantia, as to whether from any point of view the granting of that relief would be desirable or undesirable?

A Well, I certainly want to license CBS and I certainly want them to pay reasonable royalties. When you say measured by actual use of such music on those programs, I'd like to know what that means.

Q You are aware that CBS now pays ASCAP a flat sum for license to use any and all of the music in the ASCAP repertory?

A I am aware there is a blanket license.

MR. TOPKIS: That is not quite right. There is an interim fee arrangement in effect at the moment. Subject to retroactive adjustment and all other qualifications.

A (Continuing) My answer is the same. I am aware that they have a blanket license, yes.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y.C. TELEPHONE: CORTLAND 7-4580

Q And under that license the amount of music used in any year does not determine the amount paid for that license?

A That is correct.

Q The question comes down to whether you ahve an opinion as to whether it would be desirable or undesirable for CBS to pay for the music it uses in proportion to its use of the music rather than on a blanket basis.

A A great deal would depend on the terms and conditions.

Q Yes. You mean how much it paid for the use?

A I would say whether I think it is a good idea or a bad idea would be determined by the terms and conditions on which such a license would be granted.

Q What terms and conditions would make a difference?

A I don't know. You tell me. You are seeking the license.

Q You are telling me, as I understand it, that whether it was desirable or undesirable would depend upon the terms and conditions.

A You are seeking the new kind of license,

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE COrtland 7-4580

so you tell me what you want. I don't know what you want.

Q I am asking the questions.

A I am trying to answer you honestly, Mr. Rifkind, I am trying to answeras honestly as I can.

Q As I understand your answer, Mr. Chiantia, you say under some circumstances it would be desirable and under some circumstances it wouldn't be.

A Precisely.

If you sought to pay me two cents for every performance, I would find that mostundesirable.

Q Under what circumstances would it be desirable?

A I don't know. I don't know. You are seeking a different kind of license. I have never had any experience with that kind of license. I want you to set out for me exactly what you want and under what conditions you want it, and then I will tell you whether it is desirable or not desirable, as far as I am concerned.

I can't speak for ASCAP. But as far as I personally am concerned, in administering

SOUTHERN DISTRICT COURT REPORTERS
(212) 732-8330

my catalog, the MCA catalog, I would be able to tell you whether I think it is a good deal for me and my company and for my authors and composers. I can't now. I don't know what you want.

Q Have you ever made that inquiry before?

A From whom?

Q From anyone?

A Why should I? I am satisfied with what we have now.

Q You are aware, I take it, that CBS sought a change?

A Bravo.

Q As someone interested in the promotion of the music in the MCA publishing catalog, did it occur to you that you ought to find out what this customer of music wanted?

A If that customer wants to use that music, I think he should come to me.

Q Well, you testified previously that one of the functions of a music publishing company is to promote the use of music.

A Precisely.

Q And that you send people to disc jockeys and you send professional men elsewhere and that you

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y.C. WORTH 4-7580

go to recording companies in an effort to promote the use of your music.

A Precisely.

Q Since you were aware that in some respects CBS was unhappy with the present arrangement under which it obtained performance licensing for ASCAP music, did it ever occur to you that you might go to CBS and say "What is troubling you? Maybe we can straighten this out."

A I have a very simple answer for that.

I work in the context of the rules as I know them. I work in the context of the business as I know it. It is my function to find compositions and to exploit them. And I exploit them in the context of the experience which I have had and the experience which we all have. I know exactly how it works. If CBS has a different way of working this thing, let them comeand tell me. I don't know what they have in mind.

Q If tomorrow, Mr. Chiantia, CBS came to you and said "We no longer have an ASCAP license. We would like to utilize music in the MCA music catalog on television programs from time to time. We would like to obtain from you the performance

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

license to use that music."

Do you see any obstacle to reaching an agreement between CBS and MCA on that basis?

A Mr. Rifkind, if CBS were to come to me tomorrow with an arrangement for the performance of the music in our catalogs and that arrangement served the best interests of the author, composer and my company, I would negotiate in good faith.

MR. TOPKIS: Can CBS make the same statement?

Q If CBS were to come to you tomorrow, Mr. Chiantia, and say, "We are thinking of relinquishing our ASCAP license, we don't know whether we can survive as a practical matter for a short period of time without it, but we are trying to find out, and what we want to do is obtain from you an option to the right to use MCA music," do you see any difficulty in granting CBS that option?

A I don't know, because --

MR. WILE: Objection to the form of the question.

A (Continuing) I don't know. A lot would depend on, again, the kind of deal

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 (212) WORTH 4-3580

that could look forward to after the option was exercised, and I would want to be sure that the option wasn't being used as a wedge for CBS to get exactly what it wanted from ASCAP, and I would have to know how I could exist beyond that time having to license CBS directly, and I would have to know what other possibilities were involved, what other doors would be opened. Would I then start licensing roller skating rinks directly? Would I then start licensing nightclubs directly? Would I then start licensing Joe's Hot Dog Stand directly? Where would it end? I'd have to know all of that in front. I don't know. I haven't investigated yet. I cannot speculate as to what might happen.

Very honestly, I don't have all the elements to go into the mix, my friend. I just don't know. But if you are asking me whether I would in good faith negotiate a license with CBS if there were no ASCAP license, or even if there were, my answer to you is yes. I would be a fool if I didn't.

MR. TOPKIS: If you hear a knock at your door, don't think it is CBS --

MR. RIFKIND: All right, Mr. Topkis.

* * *

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. WORTH 4-7580

***

it would be ineffective in dealing with television performance licenses as opposed to motion picture performance licenses?

MR. TOPKIS: Just so the record will be absolutely clear, I take it we are all in agreement that the Harry Fox Agency performs as to motion pictures a function only as to featured use. It doesn't engage in the negotiation of rights for them and background use.

MR.RIFKIND: Thank you, Mr. Topkis.

MR. TOPKIS: Is that the way you are putting your question about television?

MR. RIFKIND: Yes.

MR. TOPKIS: If so, fine.

THE WITNESS: Repeat the question, please.

MR. RIFKIND: I will restate the question.

Q Having successfully undertaken to license feature performances -- having undertaken successfully, apparently, to license performance as well as synchronization rights, insofar as it has, to motion picture producers, do you see any reason why it couldn't license similar performance rights to television broadcasters?

A Anything is possible, and given the right

SOUTHERN DISTRICT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE WORTH 4-3580

organization -- by the right organization I mean having people involved who know what it is all about and who know how to conduct it, I don't see any reason why they couldn't do it.

However, I must tell you that there is quite a difference between licensing a performance in a feature motion picture and licensing the day-to-day use of compositions in television, for example, and the reason for that is, if I may volunteer it --

Q Please.

A -- is that the use of feature music in motion pictures is rather infrequent. In addition to which, the demand for the music is known well in advance of its actual use. A producer will know months before he actually shoots the picture that he is going to need a particular composition, and there is ample time to get in touch with the people involved. It is quite a difference, Mr. Rifkind. But, to answer your question, I don't see that there would be any difficulty in setting up an organization to do it, no.

Q Aside from the volume of transactions involved, is that the primary difficulty that you saw,

***

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

* * *

using a uniform system of coding.

Q Is that a subject you have discussed with representatives of AGAC?

A I don't remember discussing that with AGAC.

Q Mr. Chiantia, I show you a document headed Minutes of the Council of the American Guild of Authors and Composers, Meeting of October 19, 1971, and call your attention to the first paragraph of that.

Do you recall having a meeting with Mr. Eliscu as is stated in these minutes?

A I recall meeting Eliscu on many occasions. I don't remember that conversation.

Q Do you have any reason to believe that the statement is inaccurate?

A Absolutely not.

Q Is there a regular meeting of the writer-publisher committee?

A I have already answered that question.

Q I am not clear what the answer is.

A You have asked me whether the committee which was formed consisting of members of AGAC and NMPA meet regularly and I think I answered that question.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

That is the committee to which he is referring.

Q How often was it that it met?

A We haven't met in some time. We met about two or three times.

Q Over a three-year period?

A Yes. The committee itself.

You are asking me about the committee?

Q Yes. I am trying to understand what these minutes mean by regular meetings.

MR. BLUMSTEIN: I think Mr. Chiantia has told you what his understanding is.

How is he supposed to know about AGAC's understanding?

MR. RIFKIND: I am trying to find out with what regularity the committee meets.

MR. KORMAN: The minutes were 1971. Why don't you ask about that time?

Q The minutes to which we have been referring say that you indicated to Mr. Eliscu that you would call the meeting of NMPA, ASCAP, BMI and AGAC to adopt a procedure for the elimination of title plagiarism.

A That meeting was never called.

Q Why wasn't that meeting called?

A It just was never called.

Q Have there been any meetings between NMPA, ASCAP, BMI and AGAC with respect to anything else?

MR. KORMAN: Object to the form of the question.

When?

A Copyright revision.

Q When was the most recent meeting?

A About a year and a half, two years ago.

DUFF PERLMUTTER COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

Q Who attended that meeting, to the best of your recollection?

A Mr. Finkelstein, Mr. Cramer, I attended, Mr. Feist attended, I believe Mr. Wattenberg attended, not Sidney Wattenberg, Phil Wattenberg.

I don't remember who else. There were others.

Q Is the Cramer to whom you refer Milton Cramer?

A No, Ed Cramer, president of BMI.

Q Were any subjects discussed other than copyright revision?

A No.

Q Have there been any other meetings that you can recall of those four groups or representatives of those four groups?

A None that I recall.

Q Have there been any meetings that you recall of representatives of any three of those four groups, the four being ASCAP, BMI, AGAC and NMPA?

A Could you be specific, please?

Q You recall the meeting at which there were representatives of all four of those organizations. I do not want to omit the possibility of a meeting at

which three of the organizations were present but not the four, for example, NMPA, ASCAP and AGAC.

A I don't remember any meeting at which three of those four were present.

Q We have established there were meetings between representatives of two of those four, NMPA and AGAC.

A Yes.

Q What about NMPA and ASCAP?

A There were never meetings of NMPA and ASCAP.

Q That is, at any time when you were present of NMPA?

A Not that I remember, that's correct.

Q Let me show you a document entitled, Agreement between Leeds Music Corporation and ASCAP, 1966-1975, stamped "Received November 18, 1965."

Do you know whose signature appears under Leeds Music Corporation where it says by somebody, president?

A Mine.

Q That is your signature?

A Yes.

Q That is Stanley Adams who signed on behalf of ASCAP?

* * *

SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: WORTH 4-3580

***

performance rights?

MR. BLUMSTEIN: Objection to the form of the question.

A Yes.

Q Did Mr. Arrow explain to you why he was coming to you for performance rights?

A Yes.

Q What did you say and what did he say?

A He indicated to me he was having some difficulty getting a performance rights license, at least making an arrangement with ASCAP.

Q Did he tell you what the nature of that difficulty was?

A Yes, as I recall, it had something to do with not being able to arrive at a satisfactory rate to be paid.

Q Any other problems?

A Not that I recall.

Q Did you make any inquiry at that time with ASCAP as to what the nature of the difficulties between 3M and ASCAP were?

A Yes, I did.

Q What inquiry did you make and of whom?

A I called Mr. Korman, as I recall, and asked

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: (212) 264-2355

for permission to come and see Mr. Korman.

Q Did he grant permission?

A Certainly. He is very magnanimous with his time and with his wisdom.

Q Was this in late 1964?

A I can't fix the date.

Q It was certainly before March 1965?

A Yes, before I signed that agreement.

Q Did you visit Mr. Korman?

A Yes, I did.

Q Were you seeking legal advice from Mr. Korman?

A No.

Q What did you say to Mr. Korman and what did Mr. Korman say to you?

A Very simply, I asked Mr. Korman why they were having such difficulty in coming to some agreement with Minnesota Mining.

Q What did Mr. Korman say?

A He told me at that time it was a completely new use in background music, that for the first time they were confronted with a use in which the machine giving the performance was being sold rather than leased.

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE
FOLEY SQUARE, N.Y.C. TELEPHONE: CORTLANDT 7-4580

And he had some concern about the manner in which they would be able to effect collection of performing fees after the initial period of the contract.

Q How long was the initial period of the contract?

A The contract which was being proposed to me at that time was about three years.

Q Did those problems trouble you?

A I gave them a great deal of thought, yes, of course.

Q But you were capable of solving them ultimately?

MR. BLUMSTEIN: I object to the form of the question.

A I thought ultimately the problem would be solved.

Q And was it?

MR. BLUMSTEIN: I object to the form of the question.

A No, unfortunately no.

Q Did you tell Mr. Korman that you had been approached by Mr. Arrow?

A Yes.

***

***

into consideration and I told Mr. Korman at that time that I was considering going into the deal.

Q That concern, as I recall your saying, was that this was a new use and that it involved the sale of the machine.

Were there any other areas of concern?

A Well, the sale of the machine involved a problem in the eventual policing of the performing rights. That was his concern.

Q Did you suggest to Mr. Korman that ASCAP might undertake to police, or whatever the proper word is, the use of the machine after the initial period or at any time?

A At that conversation?

Q In that conversation.

A Since they already indicated to me they didn't look on it favorably, how could I suggest they police it?

Q Did you at any time suggest that ASCAP might undertake to police the agreement?

A I never suggested that, no.

Q Or to police the use?

A I don't want to get into semantics with you. I did at one time ask them whether it would be

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

possible.

Q At what time did you make that inquiry?

A When the agreement which I had made with Minnesota Mining had expired, I asked Mr. Finkelstein whether it would be possible for ASCAP to collect the performing fees from the purchasers of the machine.

Q The initial agreement was for a three-year period?

A Yes.

Q Do I understand you to say it was not till sometime after March of 1968 that you made that inquiry of Mr. Finkelstein?

A Yes.

Q What did Mr. Finkelstein say?

A He said he didn't think they could do it.

Q Did he indicate why they couldn't do it?

A Yes.

Q What were the reasons he gave?

A As I recall, Mr. Finkelstein indicated to me at that time it was a very difficult matter to police, that it would be very costly, and that it wouldn't be fair to the general membership of ASCAP to have this expense borne by the general membership of ASCAP for the benefit of a selected few.

Q Did either you or Mr. Pinkelstein suggest that the publishers who were involved might bear that expense and pay ASCAP for carrying it out?

A No.

Q Mr. Chiantia, let me show you a letter dated December 3, 1964, signed by Allen Arrow to you, and I ask you whether that helps you place the time you began your discussions with Mr. Arrow.

A I don't understand the question.

Q Did you receive that letter?

A Yes.

Q Does that indicate to you that at least by December 3, 1964, your discussions with him were well along the road?

A Oh, yes.

MR. RIFKIND: Would you mark that Plaintiff's Exhibit 88 for identification.

(Letter dated December 3, 1964, from Mr. Arrow to Mr. Chiantia marked Plaintiff's Exhibit 88 for identification.)

Q Since the sale of the machine and thus the policing problem you foresaw was a problem at the outset and which you discussed with Mr. Korman quite early on, why is it that you did not raise

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

with Mr. Finkelstein the question of ASCAP's policing the 3M program until 1968?

MR. BLUMSTEIN: I object to the form of that question.

A As I have already indicated to you, Mr. Rifkind, I had a discussion with Mr. Korman.

At that time I asked Mr. Korman why ASCAP was not making the deal with Minnesota Mining.

He explained to me why not. At that point, I took it they were not going to make the deal. Why at that point would I ask Mr. Finkelstein to do something he doesn't want to do?

Q There are two different questions, are there not?

One is whether ASCAP would license performance rights to 3M. The other is whether ASCAP would serve an audit function with respect to such performance rights. Those two functions can be separated.

A As I understand the function of ASCAP, ASCAP does not audit without licensing. It doesn't audit anybody it doesn't license, in the first instance.

Q Could it?

***

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

* * *

Q Likewise the restaurant hypothesis?

A Yes.

Q Is one of the functions of ASCAP to detect and forestall and terminate such unauthorized uses?

MR. BLUMSTEIN: I object to the form of the question.

A Yes.

Q Is it ASCAP's policy when told of a restaurant or a barber making such unauthorized uses to say to the publisher that's none of our affair because the barber or the restauranteur never came to us for a license?

MR. KORMAN: I object to the form of the question.

To shorten this, I direct the witness not to answer the question.

The question that you seem to be so concerned about, Mr. Rifkind, has been answered, namely, whether Mr. Chiantia at some point in time had a discussion with Mr. Finkelstein and what that discussion was.

We have covered it. It has been a tradition in these depositions to cover everything five times, but Mr. Chiantia is a very busy man and

I am going to call a halt right her on this line.

MR. RIFKIND: I am not sure what this line is nor how you save Mr. Chiantia's time by that speech.

Q Do you see any reason why an unauthorized use of a 3M tape by a commercial establishment is any different from any other unauthorized use of ASCAP music by a commercial establishment?

A Put that way, no.

Q Let me show you a document previously marked as Plaintiff's Exhibit 51 for identification, and ask you if you have seen it before.

A Yes, I have.

Q Is that your signature at the bottom of the page?

A Yes, it is.

Q Is this an agreement under which 3M undertook to pay Leeds and Pickwick $15,000 as a consultation fee?

MR. BLUMSTEIN: Objection to the form.

A It is.

Q What was the service rendered by Leeds or Pickwick or by you which led to that agreement or which was performed pursuant to that agreement?

***

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLANDT 7-4580

* * *

publishing, records, television, many areas.

Q Do you know a gentleman named Lou Levy?

A Yes.

Q Who is Mr. Levy?

A Mr. Levy was the president of Leeds Music.

Q Is Lou his proper first name?

A L-o-u.

Q Was he president of Leeds Music prior to its acquisition by MCA?

A Yes.

Q After the acquisition by MCA of Leeds, what was his position?

A Vice president.

Q Vice president of --

A Leeds Music.

Q You told us yesterday MCA acquired Leeds January 1, 1965.

A That's correct.

Q So that your discussions with Mr. Arrow with respect to 3M preceded that acquisition?

A That's correct.

Q Following the acquisition, did there come a time when Mr. Levy or Mr. Adams expressed to you concern as to the desirability of the negotiations

you were engaged in with 3M?

A I don't think I understand that question.

Q Am I right in thinking there was a reorganization in some sense of the management structure which Leeds was part of on January 1, 1965?

A Only in that I was now required to report to Berle Adams rather than to Lou Levy.

Q Prior to January 1, 1965, had you discussed with Mr. Levy your negotiations with 3M?

A Yes, I had.

Q Had he expressed any opinion about them?

A Yes, he did.

Q What opinion did he express?

A He thought we should go ahead.

Q After January 1, 1965, did he express to you any doubt as to his original opinion?

A No, he thought the deal should be made and he thought ASCAP would eventually make the deal.

Q Did he think the deal sould be made by Leeds or Pickwick?

A He thought a deal should be made, yes. But he was still holding to the hope ASCAP would come to some arrangement with Minnesota Mining.

Q Here you were late 1964, early 1965,

negotiating a direct arrangement with 3M.

Mr. Levy, as I understand it, was hopeful that as anASCAP arrangement --

A After 1965, after January 1, 1965.

Q After 1965 --

A After January 1, 1965. I can't fix the time exactly but sc stime he came to me and said, "I think ASCAP is going to make a deal. Why don't we hold off and see what happens?"

That is generally what he said.

Q Did he explain to you what the basis of that hope was?

A No.

Q Did you ask him?

A Yes, I did.

Q He would not tell you?

A Not that he would not tell me. He didn't quite comprehend.

Q He did not comprehend your question?

A He did not give me an explanation which made any sense to me at the time.

Q Did he indicate to you that he had spoken to anyone else with respect to whether or not ASCAP would make a deal with 3M?

A He apparently had spoken to someone else but I don't remember who.

Q Did he say to you he had spoken to anyone else?

A He must have gotten the information somewhere.

Q Did he indicate to you that he had been in touch with anyone at ASCAP?

A He was a member of the board of ASCAP.

Q Did he indicate to you that the basis for his view was what he had heard or had been told at the ASCAP board?

A No, he did not.

Q Or by other members of the ASCAP board?

A Perhaps.

Q Perhaps he indicated that to you?

A Yes. I don't remember.

Q Did you and Mr. Levy and Mr. Adams discuss the 3M negotiations?

A Never together, no.

Q Did you and Mr. Adams discuss them?

A Yes.

Q This would be after January 1, 1965?

A Right.

Q What view did Mr. Adams express?

A Mr. Adams said to me, if it is possible that ASCAP could license, I prefer that they do it.

I told Mr. Adams at that time, I didn't think that ASCAP was going to license.

Q Did Mr. Adams indicate to you why he preferred it that ASCAP did the licensing?

A No, not exactly.

Q Did you believe that you knew why Mr. Adams preferred to have ASCAP do the licensing?

MR. BLUMSTEIN: Object to the form.

A No.

Q Did you ask him why do you prefer that?

A Will you give me a moment to think about it?

Q Sure.

A I really don't remember.

Q At this point in time, that is the time of your discussion with Mr. Adams, you were on the road at least to reaching an agreement with Mr. Arrow?

A That's correct.

Q On terms which you regarded as attractive?

A I thought so, yes.

Q Did you have any reason to believe that the terms which ASCAP might ultimately reach with 3M would

be more attractive for Leeds or Pickwick?

A Did I personally have that impression?

Q Yes.

A No, I never had that impression.

Q Did you have the impression that they would be less attractive?

A I had no impression. I was satisfied with the deal that Minnesota Mining, that was given to me and I was satisfied ASCAP was not going to make the deal.

I think I have answered that question.

Q Did you say in words or in substance to either Mr. Levy or to Mr. Adams, "Since I have no reason to believe that ASCAP is going to produce a better deal for me, I think we should go forward with this deal," that is with the direct deal between Leeds, Pickwick and 3M?

A My recollection is that in discussing this with Mr. Adams, I indicated to Mr. Adams my opinion that this was a good deal, that this was something we should get involved in. That's it.

Q Did you believe that it was a good deal because it would be a profitable deal for Leeds?

A Yes.

Q And for Leeds authors and composers?

A Of course.

Q Did you suggest to Mr. Adams or to Mr. Levy that you would be derelict in your dut not only to your own company but also to the authors and composers it represented and published if it didn't press ahead and make this deal?

A I don't have that same flair for the dramatic that you do.

I merely told Mr. Adams I thought it was a good deal and we should make it.

Q Do you recall attending a meeting attended by Mr. Adams, Mr. ARrow and yourself?

A Yes, I do.

Q Do you recall about when that meeting occurred?

A Sometime after January.

Q Would it be late January 1965?

A It could have been anytime prior to the actual signing of the agreement. I just don't remember.

Q What was the occasion for that meeting?

A I told Mr. Adams that if he really felt there was a possibility ASCAP would make the deal, I

would suggest he speak to Mr. ARrow and get Mr. Arrow's point of view.

At the same time, he could avail himself to the opportunity of listening to Mr.Arrow relate the wonders of this deal, which we did.

Q At the time of that meeting, did you understand that Mr. Adams was considering not proceeding on a Leeds-3M arrangement?

A I would assume he was considering that. He was also considering doing it as well.

Q At that meeting with Mr. ARrow, did Mr. Arrow say, in words or in substance, but we already have a deal, so why are we doing this?

A I would relate to you what I remember of that meeting.

I asked Mr. ARrow for the meeting. Mr. Arrow made an appointment, we went to see Mr.Arrow. I explained to Mr. Arrow the purpose of our visit.

Mr. Arrow at that point said, if it is in any way going to embarrass Mr. Chiantia, we will forget the oral agreement that we have reached.

I said that that would not be necessary, that that was not the purpose of the meeting. The purpose of the meeting was for him to express to Mr.

Adams his opinion as to the possibility of making a deal with ASCAP and to express to Mr. Adams his feeling for the deal, which he did.

Q Why did Mr. Arrow, if you know, suppose that it might be a source of embarrassment to you?

A I don't know. I think you should ask Mr. Arrow that. I think Mr. Arrow was being very friendly. Mr. Arrow is a very good friend of mine and I had just joined MCA and Mr. Arrow was very happy about that and foresaw a brilliant future for me, and he didn't want to do anything to embarrass me.

That is a natural concern of one friend to another, which I appreciate very much.

Q Did you discuss the oral understanding you had reached with Mr. ARrow with any other publishers or their representatives?

A Yes.

Q With whom did you have such discussions?

A Mr. Leon Brettler, and many other publishers, Mr. Geroge Joy, Eddy Joy, Richard Rosenthal, and there were others.

Q With what company was Mr. Rosenthal?

A Mills; and many others.

Q Can you remember any others?

A There were others, many others. I don't remember the extent of my conversations with all of them but there were others.

Q Did you ever discuss the 3M program with Mr. Ricketts?

A No, I don't remember that.

Q Did you discuss it with anyone from Chappell & Company?

A I really don't remember.

Q Did you discuss it with Mr. Wattenberg, Philip Wattenberg?

A Yes.

Q Is he counsel for Chappell?

A At that time, yes.

Q What was the nature and substance of your conversation with Mr. Wattenberg?

A I told him I thought it was something I should get involved in and I was going to get involved.

Q What did Mr. Wattenberg say to you?

A He said it was very interesting and attractive, and he had the same feeling I had about what was going to happen at the end of the three-year period.

Q Which was?

A Effectively policing and collecting the performing fees which would have been due at that time.

Q I didn't understand the beginning of that answer.

A His concern was that at the end of the initial period, the responsibility for the licensing and collection of performing fees would devolve upon us and he wondered whether we would be equipped to do it properly, which was the concern of everyone.

Q Did he indicate to you how he had resolved that question in his own mind?

A I don't know that he resolved it.

Q Did he say anything else?

A Not that I recall.

Q Did he say to you that it was a mistake for Leeds to enter into the arrangement, in substance?

A No, I don't think so.

Q Did any publisher, any representative of any publisher with whom you spoke indicate to you that he thought it a -istake to enter into this arrangement with 3M?

A There were obviously publishers who thought

it was a mistake, and obviously some of them must have expressed it to me.

Q We deal in the obvious. Can you remember any publisher who expressed that way?

A Jack Bregman.

Q With which company is he?

A Bregman Vacco & Conn.

Q What did Mr. Bregman say?

A Mr. Bregman got very emotional about it and said it was a mistake, gave no real reasons.

Q Can you elaborate on what it is he did say?

A He just said it was a mistake.

Q A mistake in what respect?

A A mistake to leave ASCAP and license on our own.

Q Did he say why it was a mistake?

A He gave me no good reason. If he gave me a good reason, I might have followed him .

Q Did he give you any bad reasons?

A Obviously he gave me bad reasons because I made the deal.

Q What were the bad reasons he gave?

A I don't remember. As I told you, I don't remember what his reasons were, good or bad, they

didn't affect my judgment one way or the other.

Q The question is, you recall he didn't give you any good reasons. Can you recall any of the reasons he gave you?

A It was a mistkae to license individually, that we would have trouble in effectively doing so, and where was it going to stop, if you license this individually, you have to license everything else individually. That roughly was the argument, and I don't buy that argument.

Q Can you remember any other publisher who expressed a similar view?

A I don't remember,but they would have been similar.

Q Do you recall that there were other publishers who expressed views similar to Mr.Bregman?

A Yes, but I just don't remember who they were. There was a lot of talking going on that time. I just don't remember.

Q Did you ever discuss this at an ASCAP board meeting?

A No, I did not.

Q Were you ever present at an ASCAP board meeting at which it was discussed?

A No, I was not.

Q By "it" I mean the entire subject of 3M's program.

A No, I was not present at any such board meeting.

Q Prior to 1968 did you ever discuss the matter with Mr. Finkelstein?

A No, I did not.

Q Other than the conversation with Mr. Korman

* * *

Q At any of those meetings did any of those in attendance other than Mr. Finkelstein and Mr. Korman express any view on the desirability or undesirability of direct licensing of 3M?

A No.

Q You said before you had discussions with 3M with Mr. Bregman?

A That is correct.

Q Did you have many such discussions?

A Yes.

Q What was the subject matter of those discussions?

A Again, we had decided that it was a very attractive deal, that it could in the long run produce for us a great deal of money, and that it was in fact a new use and that we should at least try it on an experimental basis.

I think we both came to these conclusions. We decided we were going to go into the program.

Q Did Mr. Brettler express to you any view as to how much money it might produce?

A Not that I recall.

Q Did you express to Mr. Brettler any view or estimate as to how much money it might produce?

A That would have been completely speculative

Q You testified just a moment ago that you and Mr. Brettler agreed or shared the view that it would produce a lot of money?

A Yes.

Q What do you mean by a lot or what did you mean by a lot?

A Two, three, $400,000, $500,000.

Q For Leeds?

A That's right.

Q And a like amount of money for Shapiro Bernstein?

A Depending on the number of uses, yes.

Q Did Mr. Brettler ever say to you in your conversations with him about 3M that he had been in communication with other publishers about 3M, in substance?

A He certainly would have spoken to other publishers but I don't remember specifically, no.

Q Did he ever say to you that he was chastised, criticized by other publishers because of his willingness to enter into an agreement with 3M?

A I don't think chastised is a proper term.

As I indicated earlier some publishers thought we were making a mistake; Jack Bregman was one. I think that is about the extent of it.

Q You had an experience with Mr. Bregman which you described in which Mr. Bregman you said was somewhat emotional about the subject.

In comparing notes as it were with Mr. Brettler did he indicate to you he had similar experiences with other publishers?

A But hardly chastisement. Mr. Bregman was not only one of my strongest champions as president of the National Music Publishers Association but also elected me to the board of ASCAP.

I hardly think that would have happened if Mr. Brettler was chastising me.

Q I take it he is a friend and admirer of yours?

A I hoped he was, yes.

Q From friends, words of criticism come more heartily?

A I admit he criticized me for it but I would hardly say he chastised me for it.

Q Did he indicate to you -- did Mr.Brettler

indicate to you he had been criticized by other publishers?

A He certainly would have been. I just don't remember the circumstances.

Q Do you remember whether he indicated that to you?

A Yes, it seems to me that came into the conersation. I must have told him at that time Mr. Bregman had criticized me.

Q Do you recall whether Mr. Brettler identified anyone in particular who was critical of him in connectionwith 3M?

A No, I don't.

Q Did you ever have orally or in writing any communicationwith any writer or composer concerning 3M?

A I don't remember.

Q Did you have any communication with AGAC with respect to 3M?

A I don't remember that.

Q Let me show you a letter dated November 15, 1965, from the American Guild of Authors land Composers to publishers digned by Burton Lane, previously marked as Plaintiff's Exhibit 27 for

***

to you?

A Yes, as I have already indicated Mr. DeFreitas took the point of view that I did not have the right to license these performances.

Q Was the solution that you reached by which you paid PRS rather than the publisher a compromise position?

MR. BLUMSTEIN: I will object to the form of that question.

A I don't know that it was a compromise, but we didmake that agreement.

Q Let me show you a letter which has previously been marked as Plaintiff's Exhibit 65 for identification, dated March 2, 1967, addressed to Mr. Arrow and Mr. Chiantia, on the letterhead of Shapiro Bernstein, and the enclosure thereto, and ask if you have seen those before.

Did you receive that letter at or about March 2, 1967?

A I remember it very vaguely.

Q The letterhead on the letter of Shapiro Bernstein is signed Leon Manchester. The last sentence of the letter says:

"If any further deletions (which I think

refers to deletions in the letter enclosed) are required, please contact my legal representative, Judge Rifkind."

What did you understand all that to mean?

A When you point out to me Leon Manchester it should give you some idea of the character of Mr. Brettler. He is, to put it very kindly, a card.

Q Did you have any understanding as to what that reference to Judge Rifkind and Leon Manchester might mean?

A No, absolutely not. As a matter of fact, I don't think Judge Rifkind was our counsel at that time.

Q Did it occur to you at the time that Mr. Brettler was referring to the William Manchester book about John F. Kennedy and its revisions and litigation involving it brought by Mrs. Kennedy?

MR.KORMAN: Since we are now at 25 minutes to one and this is about the record for me in terms of irrelevance of the questions and issues in this lawsuit, I am going to direct you not to answer, and let's go to lunch.

MR. RIFKIND: I can resolve the relevance

in about one minute.

MR. KORMAN: On that representation I will withdraw my objection.

Q Does it now occur to you?

A As I say nothing that Mr. Brettler would have written in a letter would have surprised me.

Mr. Brettler is a very humorous, very funny fellow, has a tremendous sense of humor.

Q What I am really trying to figure out other than trying to figure out what Mr. Brettler does, was, was the enclosure which is a letter directed to Mr. DeFreitas--

MR. KORMAN: Written by Mrs. Kennedy.

Q -- a draft or the result of a series of drafts which had been worked over, revised from time to time by you or Mr. Arrow?

A I don't think the letter suggests that at all. I don't know how many times Mr. Brettler revised that. The letter itself suggested this was a draft of a letter which he intended to send to Mr. DeFreitas.

Q He says, "Enclosed is a revised letter along the lines suggested by Sal."

A I am not aware there is a letter which was

***

A Oh, yes. Of course.

Q If the terms that ASCAP granted were less favorable than those you had negotiated on your own, why did you not seek to negotiate directly on your own?

MR. KORMAN: Objection as to form.

A I don't think they were less favorable. If you are asking why I did not negotiate directly, I will tell you why once again: because my worst fears had been realized. At the end of the year, we were faced with a situation where people were using our compositions and not paying performance licenses.

Q Were such unauthorized uses ever detected by ASCAP investigators?

MR. KORMAN: Objection.

A Not that I know of.

Q Did you ever make inquiry?

A I told you I had a conversation --

Q My question is: Did you ever make inquiry as to whether or not unauthorized uses had in fact been discovered by ASCAP?

A No; I did not.

Q Why not?

A Because, as I already told you, I had a conversation with Mr. Finkelstein. Mr. Finkelstein

indicated to me he did not think it was fair or right or profitable for ASCAP to go ahead and license these performances. I accepted his reply as being reasonable.

Q If I told you that ASCAP investigators did in fact detect and report to ASCAP unauthorized uses by 3M customers, would you regard it as a burden for ASCAP, having those reports, to call them to your attention?

MR. KORMAN: Objection to the form.

A If ASCAP did in fact have information -- by the way, it would be the first time I heard about it -- I don't think -- that is a matter of whether it would be a burden for us or not. I don't think they have an obligation to tell us. I have no idea they did. Did they?

Q I do not know. All I am trying to find out is: If they had the information or some information as to uses of 3M tapes, what problem, what difficulty would it be for whoever the administrative personnel are at ASCAP to forward that information to you?

A I don't know that it would be difficult at all. I just have no knowledge.

Q Do you see any reason why it would take more than a letter?

A No.

Q Did you understand Mr. Finkelstein to be saying that, "Even if we should detect unauthorized uses, we will not call them to your attention, because that would be giving you an unfair advantage"?

A Absolutely not.

Q Well, then, what was it that Mr. Finkelstein thought ASCAP should not do?

A I have already testified to that.

Q Why don't you tell me again?

MR. BLUMSTEIN: I think you have really been through that a couple of times already. I just don't see any reason why you have to go through it again.

I will object to the question and instruct the witness not to answer, on the grounds that the question has been asked a number of times and answered a number of times.

Q Does Leeds or do any of its affiliates receive distributions from ASCAP in respect of the M-1200 tapes?

A I don't know whether they received any, but in the normal course we should certainly receive them.

Q That arrangement has been outstanding since about 1968. I should think in the normal course you should have already received that.

***

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE
FOLEY SQUARE, N.Y., N.Y. 10007 TELEPHONE: CORTLAND 7-4580

publishers get their songs from other sources. They sometimes buy them from corporations. They buy them overseas. They buy them from other publishers. They buy them from groups, the so-called self-contained group, a performing group which writes and records and produces its own material.

There has been a tremendous change in the taste of the public. You could no longer today, for example, called "Ah, Sweet Mystery of Life".

These are the changes to which I have referred. There has been a tremendous change in our industry, as there has been a tremendous change in all other industries in the American culture.

Q Believe me, nothing in my question was intended to suggest that the changes have been netarious, Mr. Chiantia.

A I would have thought that was obvious. The changes, I mean.

Q I am a newcomer to this field. Be patient, Mr. Chiantia.

A Thank the good Lord for that.

Q You say those changes have been attended by conflict and tension at times. Conflict between whom or what, and tension between what opposing forces?

A A lot of this was poetry. You understand this?

Q I had not understood you were a lyricist.

A A frustrated one.

To get to a case almost directly in point, you were happy to remind me of some conflict that apparently existed with respect to the Minnesota Mining Company. This might be one of the things to which I am referring.

Any new development which calls for a new form of licensing always gets the writers a bit concerned that their best interests are not being safeguarded.

It is my honest understanding that most music publishers do everything they can to safeguard the interests of composers. If you know the history of the music business, you know that there has been conflict between writers and publishers. It would be a mistake for you to assume that there is any kind of homogeniety or that there is any kind of monolithic group composed of authors, composers and publishers. It ain't!

Q You say, "Let us meet our problems and our adversaries together and draw strength from our common cause." I am interested in the reference to the word "adversaries". I take it you did not mean to that

word "adversaries" to indicate "authors".

A No. If I am speaking to authors and composers I would hardly imply that authors are our adversaries. It is very clear who our adversaries are. Our adversaries are those who wish to take advantage of us and take less than we deserve.

In this case, CBS might be described as an adversary.

Q Anyone other than CBS?

A Yes. I could give you a long list. Record pirates. Graphic infringers.

Q You have placed CBS in a very unattractive company.

A I did not mean to place them in the company of thieves. Somebody else said that.

Q Did you mean to place CBS in the category of those trying to give publishers, authors and composers less than they deserve?

MR. KORMAN: He siad, in this case, meaning, I take it, this litigation, CBS might be considered an adversary.

MR. RIFKIND: I don't want speeches from you at all, Mr. Korman. This witness is represented by Paul, Weiss and Simpson, Thacher. I will not be

confronted by three lawyers continuously interrupting my questioning. I will not have speeches from you. If you want, I will go to court right now.

MR. KORMAN: Read the question back.

(The pending question was repeated by the reporter.)

A No. If you recall, I specifically called CBS an adversary.

Q Yes. And then I asked you what the term "adversary" embraced in the context of this memorandum.

A Don't we hear of a case where CBS is trying to get music for as little as possible, and we as publishers, authors and composers want to get as much as possible? In that sense, aren't we adversaries?

Q In that sense, every user is an adversary.

A Yes. Right.

Q Without users, I take it authors, composers and publishers would be out of business.

A I beg your pardon?

Q Without users who paid for the use of music, there would be no music publishers and very few writers and composers.

A Mr. Rifkind, do you want to get into a philosophical discussion or do you want to ask me some

questions?

I have already indicated to you, your question was -- May I see the letter again?

(Document handed to the witness.)

A (Continuing) I had no idea I was such a great poet that my language inspires you to ask questions the answers to which, it would seem to me, would be terribly obvious.

I have already indicated to you there are people who would seek to make use of our music without properly compensating us for it. I will rest on that answer.

Q Is that whom you meant by "adversaries" when you wrote that statement?

A Anyone who seeks to lower the rate we feel we should be getting for our material is an adversary.

Q Including CBS?

A Including CBS.

Q Have you ever encountered a user of music who wished to pay you more than you had asked for?

A Oh, happy day. I can't recall any.

Q In substance, aren't you saying that all users of music are your adversaries?

A Don't put words in my mouth, Mr. Rifkind,

please.

Q I am trying to find out what distinguishes CBS from other users of music.

A You are zeroing in on CBS. I am not. CBS is in this particular case an adversary. I consider them to be an adversary. How many more times can I tell that to you? For whatever reason it may be, they are my adversary in this case. They are suing me.

You might recall my other business associates don't sue me. Mr. Rifkind, I like to think of all users as my customers. When a customer turns around and sues me, do you expect me to consider that a friendly act? He is my adversary. Until that time, he is my customer. When he sues me, he is my adversary, not my customer.

I hope I have made that plain. Please let's get on to another question.

Q Mr. Belnick has supplied us with a schedule showing the distributions received from ASCAP by the Leeds group of music publishers, the CBS credits and total credits at ASCAP for that group for the years 1967 to 1972.

I ask you to look at that and tell me whether you believe it is reasonably --

ing the price of a music publishing company?

A Yes. There is a rule of thumb which is commonly bruited about in the music business, but it is no more reliable than the one that you can use four bars of music without fearing an infringement claim.

Q What is the rule of thumb commonly bruited about?

A Ten times your performance earnings, seven and a half times your retained royalties. Take your pick. There are all kinds of old saws.

Q When you say "performance earnings", does that mean especially ASCAP and BMI distributions?

A Whatever performing royalties you receive. If you are a member of both, it would be a multiple of those royalties. Publisher's share.

Q It does not include earnings on mechanical rights, that formula?

A As I told you, there is also one that takes into account the mechanical earnings. I said seven and a half times. Any multiple. Seven and a half, eight and a half, five times, four times.

Retained royalties could refer to mechanical royalties after payment to the writers and performance royalties. Some even include sheet music.

Q In preparing your bid for Chappell, what factors did you take into account?

A We took into account what use we could make of it. We took into account how much we could further exploit the catalog, whether our expertise would in fact increase the revenue.

We made an estimate as to whether Chappell had properly administered the catalog in the last five or six years, thereby reflecting itself in the earnings. We made a determination as to the value of the catalog in terms of how long it might last. We evaluated the compositions in the catalog individually.

We made a study of the period of time for which the copyrights were still to run, the important compositions.

There are many things you look into. I am available as a consultant if you want my help.

Q Do you know, or did you know a gentleman named Arthur Israel?

A Yes.

Q Am I right that he is deceased?

A Yes.

Q Who was Mr. Israel?

A Let me get this as correct as I can get it.

Mr. Israel was an executive of Paramount Pictures. He also had the responsibility for overseeing the conduct of the affairs of the music companies which belonged to Paramount Pictures.

At that time, I believe they would have been famous in Paramount.

Arthur Israel was also, for a very short period of time, the president of what was then the Music Publishers Protective Association.

Q When did Mr. Israel did? Do you recall?

A I don't remember.

Q Was it about 1965 or '6?

A I would say about '65, 66, yes.

Q Did you ever discuss the 3M program with Mr. Israel?

A I must have.

Q Do you recall the substance of that discussion?

A No. It would not have been any different from the conversations I had with anybody else.

Q Do you recall whathis view was?

A I really don't remember. I don't even remember whether they went into the program or not.

Q They did not?

A They did not.

MR. BLUMSTEIN: We are talking about the M-700 series, correct?

MR. RIFKIND: Correct.

Q With that information, do you recall whether he expressed a negative view to you about the 3M program?

A I really don't remember what his point of view was. Since they did not go into the program, they must have expressed something negative, some negat[illegible] point of view. But I really don't remember.

Q You mentioned before lunch some conversations with Mr. Bregman.

A Yes.

Q You told me at the time what his firm was. Could you tell me about --

A Vacco and Conn.

Q Yesterday I asked you whether if CBS were to come to you and explain to you that it had no ASCAP license and wished to obtain performing rights from you for use on television, you would be happy to negotiate with them. I recall that you said you would certainly negotiate in good faith.

Do you suppose that you would license CBS to broadcase --

* * *

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(5151-R)